Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

GENERAL TRUCK DRIVERS AND HELPERS UNION LOCAL NO. 92, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO,

Petitioner,

v.

JAMES WILSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the measure of damages as against a labor union in a "hybrid 301" action, alleging breach by an employer of a collective bargaining agreement and breach by the union of the duty of fair representation, properly includes the plaintiff employee's attorney's fees incurred in the pursuit of his claims against both the employer *and* the union itself.

2. Whether an award of attorney's fees as an element of damages in a "hybrid 301" action properly may exceed the amount actually expended or incurred by the sole prevailing plaintiff.

PARTIES TO THE PROCEEDINGS

The correct name of the Petitioner is General Truck Drivers and Helpers Union Local No. 92, affiliated with the International Brotherhood of Teamsters, AFL-CIO; in the proceedings below, the Petitioner generally was referred to as "Teamsters Local 92," the designation used in the Plaintiffs' complaint. The Petitioner is an unincorporated labor association.

The Respondent is James Wilson; his former counsel, Edward L. Gilbert, is also a party in interest. Five other individuals were plaintiffs, and two employers and two other union entities were defendants, at earlier stages of the proceedings but are not parties before this Court.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit in this case, as amended, is unreported and is attached as Appendix 2. The earlier Court of Appeals decision it amended can be found as Appendix 1. The order of the United States Court of Appeals for the Sixth Circuit denying the petition for rehearing and suggestion for rehearing en banc are reproduced as Appendix 7. The relevant amended judgment entry and judgment entry of the United States District Court are unpublished and are reproduced as Appendices 3 and 4, respectively. The memorandum opinions of the United States District Court are unpublished and are reproduced as Appendices 5 and 6, respectively.

JURISDICTIONAL GROUNDS

The United States Court of Appeals for the Sixth Circuit issued its decision, as revised, on January 12, 1999. That court denied the petition for rehearing on February 26, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTE

Section 301 of the Labor Management Relations Act of 1947 provides in pertinent part as follows:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties,

without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

29 U.S.C. § 185(a), (b).

STATEMENT OF THE CASE

A. Statement of Facts

This matter arises from a "hybrid 301" suit[1] filed by Plaintiff James Wilson and five others against their former employer, Matlack, Inc., and an alleged alter ego company, Casol Leasing, Inc., for breach of a collective bargaining agreement and against their union, General Truck Drivers and Helpers Union Local No. 92, affiliated with the International Brotherhood of Teamsters, AFL-CIO ("Local 92" or "the Union"), for breach of the duty of fair representation. Plaintiffs were tank truck drivers at a Matlack terminal in Canton, Ohio; they were laid off in May 1988 when Matlack closed the facility. The complaint alleged that Mr. Wilson learned in May 1991 that Matlack had opened a new terminal in nearby Akron, Ohio in 1989. Through Local 92, Mr. Wilson filed a grievance asserting that he should have been re-called to employment at the Akron location. Although the Union's representatives expressed doubt about the likelihood of success, given the fact that Mr. Wilson previously had rejected an offer of re-employment at another Matlack facility and given the length of time that had passed, they nonetheless processed the grievance through the contractual steps.

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[1] This refers to a case filed by an employee individually for breach of a collective bargaining agreement between the employee's union and the employer under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. To prevail, the plaintiff employee must prove both that the employer's action violated the terms of the contract and that the union breached its duty of fair representation of the employee with regard to the matter. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 570-71 (1976); Vaca v. Sipes, 386 U.S. 171, 186 (1967).

The grievance eventually was presented to a joint labor-management arbitration panel in October 1991; the panel denied the grievance on the grounds it was not filed within the required time period after Mr. Wilson knew or should have known of the existence of the Akron facility. Because of its ruling on the timeliness issue, the arbitration panel did not hear the parties' presentations on the merits of Mr. Wilson's claim that, under the collective bargaining agreement, he should have been offered re-employment at the Akron terminal.

B. Proceedings in the District Court

Mr. Wilson and five former co-workers filed suit in the Northern District of Ohio alleging, *inter alia*, that the Union breached its duty of fair representation by processing and investigating Mr. Wilson's grievance in a perfunctory manner, even though the Union did not have the opportunity to present his case on the merits. The District Court granted summary judgment against the five Plaintiffs other than Mr. Wilson for their failure to file a grievance and exhaust their contractual remedies, and the case proceeded to trial solely on the claims of Plaintiff Wilson. The matter was tried to a jury in February 1994; the jury rendered a verdict in Plaintiff's favor, apportioning liability and compensatory damages 25% to the Union and 75% to the employer Defendants, jointly and severally. After post-trial motions, the District Court entered judgment for Plaintiff in the remitted amount of $133,296.83, representing future pension benefits. See Wilson v. International Brotherhood of Teamsters, 83 F.3d 747, 751 (6th Cir. 1996). The trial court denied Plaintiff's request for attorney's fees. See id. at 753.

All Defendants appealed the judgment on liability and damages, and Plaintiffs appealed the denial of attorney's fees, among other issues. In May 1996, the Sixth Circuit affirmed the judgment in part and reversed it in part, upholding the liability rulings and the dismissal of the five Plaintiffs other than Mr. Wilson. The only portion of that decision relevant to the present petition is the ruling that Mr. Wilson was entitled to recover from the Union as an additional element of damages the attorney's fees incurred in pursuing his claims against the employers. The Sixth Circuit held that, although attorneys' fees are not generally awarded to a prevailing party in an ordinary civil case, "in Section 301 cases the damages arising from a union's breach of its duty of fair representation include the attorneys' fees reasonably incurred in pursuing a claim against the employer for breach of the collective bargaining agreement." 83 F.3d at 753. The court remanded the case for a determination of Plaintiff's attorney's fees "expended in pursuing his claims against Matlack and Casol Leasing." Id. at 754.[2]

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[2] After this decision by the Sixth Circuit, Local 92 petitioned this Court for a writ of certiorari. Case No. 96-613. The Union sought a definitive ruling to resolve a split in authority among the circuits on the availability of attorney's fees as a measure of damages in a hybrid 301 case where, as here, a union already has been ordered to pay a proportionate share of the plaintiff's compensatory damages under Bowen v. United States Postal Service, 459 U.S. 212, 223 (1983), and Aguinaga v. United Food & Comm'l Workers Int'l Union, 993 F.2d 1463 (10th Cir. 1993). However, this Court denied the petition for a writ of certiorari.

Local 92 continues to submit that the most rational and appropriate rule is that the plaintiff's damages in a hybrid 301 case should be apportioned based on comparative fault and that

On remand, the District Court ordered the Union to pay the Plaintiff the amount of $104,487.40 in attorney's fees, costs and expenses. (App. 3.) Despite the Sixth Circuit's order that the Union pay "the attorneys' fees reasonably incurred in pursuing a claim against the employer" (emphasis added), the trial court's fee award included substantially all the fees incurred in prosecuting the case,[3] including those incurred in the claims against the Union itself and in the appellate proceedings involving the Union. (App. 6 at 33a-34a.) The court also calculated the fees at a greater hourly rate than was established in the fee agreement between the Plaintiffs and their counsel and awarded a total amount that was substantially more than was paid or incurred by Mr. Wilson. (App. 6 at 42a-45a.)

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attorney's fees are not awardable. Such a rule takes into account the relevant principles that favor apportioning damages according to fault, protecting the collective interests of union members in preserving limited funds and providing appropriate safeguards and incentives for both employers and unions to fulfill their obligations to employees. It would also avoid the incongruous and ironic result -- the result that occurred in this case -- that a union may be ordered to pay more in damages and fees than the employer, the original wrongdoer whose fault the union has been unable to correct. However, Local 92 recognizes that the Sixth Circuit's decision awarding both damages and attorney's fees against the Union here remains the law of the case.

[3] The District Court did reduce the total fee slightly for the time expended in unsuccessfully fighting the Defendants' motions for summary judgment against the five other Plaintiffs and for a portion of the costs of the appeal attributed to that issue. (App. 6 at 40a-41a.)

The trial judge referred the case to a magistrate to determine the amount already paid to Mr. Gilbert by Mr. Wilson and the other Plaintiffs and the amount, if any, to be reimbursed to Mr. Wilson from the eventual fee award against Local 92. (App. 3 at 8a.) After the Union filed an appeal of the fee award, the magistrate issued a report -- later adopted by the District Court -- determining that, under the parties' fee agreement, Plaintiffs' counsel had charged Mr. Wilson and the other five Plaintiffs the total sum of $97,742.65 in fees and costs, the Plaintiffs had paid him a total of $89,339.42 and Mr. Wilson individually had paid $15,758.86. (See App. 2 at 5a-6a.)

C. Proceedings in the Court of Appeals

Local 92 filed a timely appeal of the attorney's fee award; neither Mr. Wilson nor Mr. Gilbert, who had become adversarial to each other, appealed the ruling on reimbursement to Mr. Wilson of the fees he had paid. The substantive issues raised in the Union's appeal -- primarily, whether the trial court erred in awarding the Plaintiff his fees incurred in making the claim against the Union itself, in awarding fees in excess of those charged by the Plaintiff's counsel and incurred by the Plaintiff and in awarding fees incurred on appeal as well as in the District Court -- were extensively briefed by Local 92 and by Mr. Gilbert. On December 24, 1998, the Sixth Circuit issued a two-page, per curiam order. (App. 1.) The order's brief recitation of the history of the case did not mention that Local 92 had appealed from the District Court's ruling on the elements and amount of attorney's fees and costs and did not address any of the issues raised and briefed in that appeal. The decision discussed only the trial court's order that Mr. Wilson be reimbursed from the attorney's fee award in the amount of $15,758.86; it also noted that the six Plaintiffs' payment to

Mr. Gilbert of $89,339.42 "sufficiently provides Gilbert with all the payment he is entitled to receive." (App. 1 at 2a-3a.) The court's order concluded by affirming "[t]he judgment of the district court." (App. 1 at 3a.)

Counsel for Local 92 was unable to determine from the order whether the appellate court intended that the sum already paid by the Plaintiffs to Mr. Gilbert was to constitute the total attorney's fee award in this case -- in effect reducing the trial court's award -- or whether the Court intended that the award against Local 92 in the amount of $104,487.40 should stand. Accordingly, the Union filed a motion for clarification, seeking to know specifically whether the judgment against it was affirmed and urging the original panel to address the substantive issues presented by the appeal.

On January 12, 1999, the Sixth Circuit issued a new order that was substantially identical to the December 22 order, with the only change being that the final sentence stated that the Court "affirm[s] the amended judgment entered June 17, 1997, and affirm[s] the opinion, order and judgment entered on October 10, 1997." (App. 2 at 6a.) The court later denied the Union's request for rehearing or for rehearing en banc. (App. 7.)

REASONS FOR GRANTING THE WRIT

A. THE SIXTH CIRCUIT IMPROPERLY REQUIRED THE UNION IN THIS "HYBRID 301" CASE TO PAY THE PLAINTIFF'S ATTORNEY'S FEES INCURRED IN PURSUING HIS CLAIMS AGAINST THE UNION ITSELF.

The Sixth Circuit upheld, entirely without discussion or analysis, the District Court's ruling that the Union should

be required to pay the Plaintiff's attorney's fees incurred both in the claims against the employer Defendants and in the claims against the Union itself. This decision is contrary to prior rulings from both other circuits and the Sixth Circuit; more significantly, it is unsupported by any statutory authority, case law or policy reasons. To the contrary, an exception to the American Rule, applicable solely to unions in hybrid 301 cases, would ignore "one of the primary justifications" for the rule -- "that 'one should not be *penalized* for merely defending or prosecuting a lawsuit.'" Summit Valley Indus., Inc. v. Local 112, United Bhd. of Carpenters, 456 U.S. 717, 724 (1982) (emphasis in original). It also would contravene the policy under the federal labor law, as enunciated by this Court, to avoid "compromising the collective interests of union members in protecting limited funds." International Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 50 (1979).

Under the American Rule, "a prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser." Alyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S. 240, 247 (1975). The only circumstances justifying the award of attorney's fees, in the absence of statutory authorization, are where: 1) a party recovers "a fund for the benefit of others in addition to himself;" 2) there has been a willful disobedience of a court order or 3) "the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" Id. at 257-59 (citations omitted). None of these exceptions apply to permit the award of fees the Plaintiff incurred in making his claims against the Union in this case or in responding to the Union's good-faith appeal of the judgment against it.

The Sixth Circuit has stated the view that a fair representation claim against a union presents a "different

situation" from the ordinary civil case, in which the American Rule applies, because in a hybrid 301 case "the principal element of [plaintiff's] damages is the amount which it cost him in attorney fees and other expenses to do that which the union was obliged but failed to do on his behalf." Scott v. Teamsters Local 377, 548 F.2d 1244, 1246 (6th Cir. 1977). As the Third Circuit has explained:

> When there is a legal duty to provide representation, . . . if the representation is wrongfully withheld, the cost of substitute representation should be recoverable damages. That is not to say that in the suit against the Union fee shifting as such would be appropriate. Rather the employee should recover as damages from the Union only the attorneys' fees incurred in pursuing the section 301 claim against the employer -- consequential damages flowing from the Union's alleged breach of its duty of fair representation.

Ames v. Westinghouse Elec. Corp., 864 F.2d 289, 293 (3d Cir. 1988) (emphasis added).

The theory is that, where a union has in some way failed to represent the employee in his contract claim against the employer, the fees the employee incurred in pursuing that case himself are not a result of the union's harm but are "the harm itself." Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270, 1275 (9th Cir. 1983).[4] By contrast, an award that

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[4] Notably, in Scott, Ames and Dutrisac, the union was not liable for a share of compensatory damages under Bowen, as Local

includes the fees and expenses incurred in the plaintiff's claims against the union itself "raises different issues. It, indeed, would penalize [the union] for litigating the issue of whether it breached its duty of fair representation and would be improper . . .." Id. at 1275 n.3.

The decisions in Scott and the other cases cited above "make it clear that fees cannot be awarded against a union for the prosecution of other portions of the case. . . . Attorney fees attributable to plaintiff's case against union defendants are not damages under the Scott rationale. They are not part of the 'difficulty and expense of collecting from the employer.'" Hardesty v. Essex Group, Inc., 550 F.Supp. 752, 767 (N.D. Ind. 1982)(emphasis in original)(citing Scott; Czosek v. O'Mara, 397 U.S. 25, 30 (1970)). See also, e.g., Zuniga v. United Can Co., 812 F.2d 443, 454-55 (9th Cir. 1987); Del Casal v. Eastern Airlines, Inc., 634 F.2d 295, 301 (5th Cir. 1981); Self v. Teamsters Local Union No. 61, 620 F.2d 439, 444 (4th Cir. 1980); cf. Rogers v. Air Line Pilots Ass'n, Int'l, 988 F.2d 604, 616 (5th Cir. 1993) (plaintiff not entitled to recover attorney's fees incurred exclusively in pursuit of action against the union for breach of duty of fair representation).

The District Court's briefly stated rationale for assessing all the fees against the Union in this case was that the claims against the employers and the Union were "necessarily intertwined" and that it was inappropriate "to attempt to distinguish fees spent on the claim against the union from fees spent on the claim against the employer." (App. 6 at 33a-34a.) However, the case on which the trial court relied for this ruling involved entirely different circumstances and is

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92 was in this case.

inapposite here. In that case, Bennett v. Local Union No. 66, 958 F.2d 1429 (7th Cir. 1992), the court found that the employer and the union acted together to "give away" the plaintiff's contract rights and thus "participated in each other's breach; indeed, the Company's breach of the labor contract in this case depended upon the Union's abandonment of its representation." Id. at 1438-39, 1440. Because of the collusion between the union and employer, then, the components of the plaintiff's case were necessarily intertwined and she was awarded all of her attorney's fees. Id. Indeed, based on the employer's and union's collusion in wrongful and fraudulent activity, the Bennett court awarded both attorney's fees and compensatory damages against them jointly and severally, in another departure from the usual hybrid 301 case. Id. at 1440-41. The Bennett court specifically noted that such collusion between the defendants, resulting in an award of all attorney's fees, is not typical in hybrid 301 cases. Rather, it pointed out, "[t]o avoid conflict with the American rule, courts generally limit fees awarded as damages in hybrid section 301 cases to the expenses incurred in pursuing the claim against the employer, not against the union." Bennett, 958 F.2d 1440 (emphasis added) (citing Dutrisac, 749 F.2d at 1275 & n.3; Ames, 864 F.2d at 293).

In this case, unlike in Bennett, there was absolutely no evidence of collusion between the Union and the employer, and the Defendants did not "participate in each other's breach." Indeed, the alleged breach of contract by Matlack occurred in 1989, when the company opened a terminal in Akron and did not notify Mr. Wilson as a former Canton driver or offer him a new position; the alleged breach by the Union occurred more than two years later, in 1991, when it processed and presented Mr. Wilson's grievance. The claims against the Union and employer in this case were separate and

"distinctly different." Zuniga, 812 F.2d at 453. Although the allocation of the fees may have presented "serious practical problems,"[5] there was no basis in law for subverting the American Rule and penalizing the Union for a good-faith defense of the claims against it and an appeal of the judgment by awarding the entire amount of Plaintiff's attorney's fees against the Union.

The Sixth Circuit's decision here, upholding an award of fees against the Union itself, is in contravention of the case law from all circuits that have considered the issue and that have awarded only the fees incurred in the claims against the employer, see, e.g., Zuniga v. United Can Co., 812 F.2d 443, 454-55 (9th Cir. 1987), or that have assessed fees jointly and severally against both union and employer where there has been collusion. See, e.g., Bennett v. Local Union No. 66, 958 F.2d at 1438-40; cf. Cruz v. International Bhd. of Elec. Workers, Local 3, 34 F.3d 1148 (2d Cir. 1994)(affirming award of fees under common benefit doctrine). This Court should address this conflict in the circuits and enunciate a clear rule regarding the award of fees as a measure of damages in hybrid 301 cases.

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[5] Milstead v. Teamsters Local Union No. 957, 649 F.2d 395, 396 (6th Cir. 1981)(referring to problems of allocating compensatory damages between union and employer in hybrid 301 case). Similarly, in Zuniga, the Ninth Circuit held that a trial court is required to apportion attorney's fees between those expended in the claims against the employer for breach of contract and against the union for breach of the duty of fair representation; the court upheld the trial court's determination that two-thirds of counsel's time was spent on the contract claim against the company. Zuniga, 812 F.2d at 454.

B. THE SIXTH CIRCUIT IMPROPERLY AFFIRMED AN AWARD OF FEES AND COSTS IN EXCESS OF WHAT THE PLAINTIFF ACTUALLY INCURRED AND WHAT WAS REQUIRED TO MAKE HIM WHOLE.

This Court has not addressed the proper measure of attorney's fees to be applied when the fees are awarded as a measure of damages rather than under a fee-shifting statute. Guidance from the Court is required to make clear that section 301 is not a fee-shifting statute and that fees in such cases are awardable only to the extent necessary to make the plaintiff employee whole.

The Sixth Circuit in its remand to the trial court after the initial appeal did not award attorney's fees to Plaintiff at some abstract "reasonable" amount or even at some objective market rate. Rather, the court ordered that the Union pay only the amounts Mr. Wilson "expended in pursuing his claims against Matlack and Casol Leasing." 83 F.3d at 754 (emphasis added). The trial court, however, erroneously treated this proceeding as a civil rights case governed by a fee-shifting statute and concluded that Plaintiff was entitled to a "reasonable" fee. (App. 6.) The District Court applied an hourly fee much greater than counsel actually charged the Plaintiffs,[6] failed to reduce the award by the amounts expended by the other five, unsuccessful Plaintiffs and

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[6] Under their fee agreement with Mr. Gilbert, the Plaintiffs were charged for services at the rate of $85.00 per hour in-court and $75.00 per hour out-of-court. (App. 6 at 31a.) However, the District Court ordered that fees be paid to Mr. Gilbert at the "reasonable" rate of $175.00 for in-court and $125.00 for out-of-court work. (App. 6 at 44a.)

otherwise failed to take into account what was actually expended or incurred by the prevailing Plaintiff. The appellate court then upheld the fee award of more than $104,000, an amount far in excess of Mr. Wilson's actual payments to his attorney of $15,758.86, and of any additional amounts he may have incurred but not yet paid, and thus far greater than necessary to make him whole.

This fee award confuses the purposes of attorney's fees provisions in civil rights claims and in hybrid 301 cases. The goal of attorney's fees provisions in the civil rights statutes is to encourage private litigants to act as "a 'private attorney general,' vindicating a policy that Congress considered of the highest priority. . . . Congress therefore enacted the provision for counsel fees [in the Civil Rights Act of 1964] . . . to encourage individuals injured by racial discrimination to seek judicial relief." Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968).

In a hybrid 301 case, by contrast, the purpose of an award of a portion of the plaintiff's attorney's fees is simply to make him whole by compensating him for expenses incurred in making his claim against the company where the union has failed to do so. See, e.g. Ames v. Westinghouse Elec. Corp., 864 F.2d 289, 293 (3d Cir. 1988). The "private attorney general" theory and the public policy considerations inherent in the anti-discrimination laws simply do not apply in breach of contract cases such as this.

The fee award here unjustifiably and erroneously increased the hourly rate to an amount substantially more than the fee to which Plaintiff and his counsel had agreed.[7] The Sixth Circuit further erred by ordering the Union to pay a much greater amount than was actually incurred by the only prevailing Plaintiff, Mr. Wilson. The Magistrate Judge reviewed the fee agreement between Plaintiff's counsel and the six original Plaintiffs and the account records. He determined that the total amount of attorney's fees and costs billed to the Plaintiffs under the agreement -- including the non-recoverable amounts incurred in unsuccessful claims and for the unsuccessful Plaintiffs -- was $97,742.65. Of this amount, $89,339.42 had been paid, leaving an unpaid balance of $8,403.23. The amount of $15,758.86 was paid by Mr. Wilson as his share of these billings; the appeals court affirmed the order that this amount be reimbursed to him out of the sums to be paid by Local 92 as attorney's fees and costs. (App. 2 at 6a.) Assuming Mr. Wilson is solely responsible for all of the unpaid balance, the total amount he "incurred" is $24,162.09.

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[7] This is not a case where an enhanced hourly rate may be justified because the attorney has "take[n] cases on contingency, thus deferring payment of [his] fees until the case has ended and taking upon [himself] the risk that [he] will receive no payment at all." Hensley v. Eckerhart, 461 U.S. 424, 448 (1983). Mr. Gilbert received payment from the Plaintiffs of more than $89,000, and there is no indication there was any limitation on the total amounts the Plaintiffs would be obliged to pay him under his fee agreement. Plaintiff's counsel bore no risk of non-recovery that would justify a higher rate.

To calculate fees at a rate higher than counsel charged and to award a total payment greater than the Plaintiff himself incurred -- certainly, to award an amount more than four times greater -- would not serve the purposes of making him whole and would result in an unjustified windfall, either for Plaintiff or his counsel. Such a result was not contemplated by Scott or the other cases and cannot be countenanced under this Court's precedent concerning both the American Rule and the policies underlying federal labor law.

The Petitioner respectfully urges this Court to review the award and to issue a decision delineating the proper calculation of fees that are awarded not under the fee-shifting provisions of the civil rights laws but as an element of actual damages in a contract case such as this.

CONCLUSION

For the foregoing reasons, Petitioner, General Truck Drivers and Helpers Union Local No. 92, respectfully prays that this Court grant its application for a writ of certiorari.

Respectfully submitted,

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APPENDIX 1

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed: December 22, 1998]

Nos. 97-3668/97-3672

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

JAMES WILSON,
Plaintiff-Appellee,

TIMOTHY R. WADDING, et al.,
Plaintiffs,

v.

THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, et al.,
Defendants,

GENERAL TRUCK DRIVERS AND HELPERS LOCAL UNION 92,
Defendant-Appellant.

ORDER

BEFORE: MARTIN, Chief Judge; KENNEDY and SILER, Circuit Judges.

PER CURIAM. Plaintiff James Wilson and five others filed this action in November 1991 in the United States District Court for the Northern District of Ohio, Eastern Division, against defendants General Truck Drivers and helpers Union Local 92, Matlack, Inc. and Casol Leasing, Inc. The plaintiffs, former employees of Matlack and former members of the Union, alleged that Matlack and Casol breached the terms of a collective bargaining agreement and that the Union breached its duty of fair representation.

The district court granted summary judgment in favor of the defendants against all the plaintiffs except Wilson. In February 1994, the jury rendered a verdict in favor of Wilson and apportioned liability among the defendants accordingly. However, the district court denied Wilson's request for attorney fees and costs. Wilson appealed the denial of attorney fees and costs to this Court.

Pursuant to remand by this Court, the district court awarded Wilson attorney fees and costs in the amount of $104,487.40. On June 17, 1997, the district court referred the case to a Magistrate Judge to determine what portion of the award Wilson should be reimbursed for his payments to plaintiffs' counsel, Edward Gilbert, for attorney fees and costs.

The Magistrate Judge determined that Gilbert had already received $89,339.42 in payments for attorney fees and

costs. This amount sufficiently provides Gilbert with all the payment he is entitled to receive. The Magistrate Judge also found that Wilson had paid $15,758.86 of the total payment to Gilbert. Accordingly, the Magistrate Judge recommended that Wilson receive $15,758.86 as reimbursement.

The district court correctly approved the Magistrate Judge's factual findings for Wilson. Therefore, Wilson is entitled to receive $15,758.86 as reimbursement for payments to Gilbert for attorney fees and costs.

The judgment of the district court is affirmed.

APPENDIX 2

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed: January 12, 1999]

Nos. 97-3668/97-3672

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

JAMES WILSON,
Plaintiff-Appellee,

TIMOTHY R. WADDING, et al.,
Plaintiffs,

v.

THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, et al.,
Defendants,

GENERAL TRUCK DRIVERS AND HELPERS LOCAL UNION 92,
Defendant-Appellant.

ORDER

BEFORE: MARTIN, Chief Judge; KENNEDY and SILER, Circuit Judges.

PER CURIAM. Plaintiff James Wilson and five others filed this action in November 1991 in the United States District Court for the Northern District of Ohio, Eastern Division, against defendants General Truck Drivers and Helpers Union Local 92, Matlack, Inc. and Casol Leasing, Inc. The plaintiffs, former employees of Matlack and former members of the Union, alleged that Matlack and Casol breached the terms of a collective bargaining agreement and that the Union breached its duty of fair representation.

The district court granted summary judgment in favor of the defendants against all the plaintiffs except Wilson, In February 1994, the jury rendered a verdict in favor of Wilson and apportioned liability among the defendants accordingly. However, the district court denied Wilson's request for attorney fees and costs. Wilson appealed the denial of attorney fees and costs to this Court.

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The Magistrate Judge determined that Gilbert had already received $89,339.42 in payments for attorney fees and

costs. This amount sufficiently provides Gilbert with all the payment he is entitled to receive. The Magistrate Judge also found that Wilson had paid $15,758.86 of the total payment to Gilbert. Accordingly, the Magistrate Judge recommended that Wilson receive $15,758.86 as reimbursement.

The district court correctly approved the Magistrate Judge's factual findings for Wilson. Therefore, Wilson is entitled to receive $15,758.86 as reimbursement for payments to Gilbert for attorney fees and costs.

We hereby affirm the amended judgment entered June 17, 1997, and affirm the opinion, order and judgment entered on October 10, 1997.

APPENDIX 3

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed: June 17, 1997]

Case No. 5:91 CV 2348

JAMES WILSON, *Plaintiff*,

v.

LOCAL 92, *Defendant*.

AMENDED JUDGMENT ENTRY

The Court issued a judgment entry on May 19, 1997, awarding judgment to the plaintiff James Wilson and his counsel, Edward Gilbert, the sum of $106,656.22 in attorney fees and costs together with interest thereon from the date of the judgment as computed according to federal law. The amount represents $95,237.32 in attorney fees and $11,418.90 in costs.

Subsequently the defendant Local 92 filed a motion seeking relief from judgment. In a memorandum opinion and

order dated May 29 the Court denied the motion but noted that there appeared to be merit to Local 92's contention that the sum of $2,168.82 in costs should be deducted from the judgment because it was related to the plaintiff's failed action against dismissed defendants. The Court gave plaintiff's counsel leave until June 13 to show cause why the Court should not reduce the judgment for costs by the sum of$2,168.82. Plaintiff's counsel did not file a response to the Court's show cause order.

Accordingly, the Court hereby reduces its original judgment by $2,168.82 and hereby enters judgment in favor of the plaintiff James Wilson and his counsel, Edward Gilbert, in the amount of $104,487.40. Such amount represents $95,237.32 in attorney fees and $9,250.08 in costs.

By separate order the Court will refer this case to Magistrate Judge James S. Gallas for the preparation of a Report and Recommendation on the sole remaining issue, i.e., the controversy between Mr. Wilson and Mr. Gilbert over the amount of attorney fees to be reimbursed to Mr. Wilson.

A copy of this judgment entry shall be mailed forthwith to counsel of record and to the plaintiff James Wilson at his address of 3825 Hein Avenue, S.E., East Canton, Ohio 44730.

IT IS SO ORDERED.

s/_____
David D. Dowd, Jr.
U.S. District Judge

APPENDIX 4

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed: May 19, 1997]

Case No. 5:91 CV 2348

JAMES WILSON,
Plaintiff,

v.

LOCAL 92,
Defendant.

JUDGMENT ENTRY

The Court issued a memorandum opinion on April 28, 1997, on the issue of attorney fees owed to plaintiff and his counsel in this case and gave the parties leave until May 16 to request an evidentiary hearing (Docket No. 485). The opinion stated, "In the absence of a timely objection . . . a judgment entry will be entered awarding judgment to the plaintiff James Wilson and his counsel, Edward Gilbert, against Local 92 in the sum of $95,237.32 as the award of attorney fees together with interest thereon from the date of judgment as computed according to federal law with the

mandate that the monies necessary to pay the judgment be deposited by the defendant Local Union 92 directly with the clerk of this court." (Id. at pp. 23-24).

The Court subsequently issued a memorandum opinion on the issue of costs on May 2, 1997 (Docket No. 486). It concluded that costs in the amount of $11,418.90 were to be awarded in favor of the plaintiff and his counsel and against Local 92. The Court imposed the same May 16 deadline for an evidentiary hearing.

The Court has received no request for an evidentiary hearing from any party. Consequently, for reasons set forth in its memorandum opinions of April 28, 1997, and May 2, 1997, the Court hereby awards judgment to the plaintiff James Wilson and his counsel, Edward Gilbert, the sum of $106,656.22 in attorney fees and costs together with interest thereon from the date of the judgment as computed according to federal law. The money necessary to pay the judgment shall be deposited by the defendant Local 92 directly with the clerk of this court in Akron.

A copy of this judgment entry shall be mailed forthwith to counsel of record and to the plaintiff James Wilson at his address of 3825 Hein Avenue, S.E., East Canton, Ohio 44730.

IT IS SO ORDERED.

s/_____
David D. Dowd, Jr.
U.S. District Judge

APPENDIX 5

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed: May 2, 1997]

No. 5:91 CV 2348

JAMES WILSON,
Plaintiff,

v.

LOCAL 92,
Defendant.

MEMORANDUM OPINION

I. Introduction.

On April 28, 1997, the Court filed a Memorandum Opinion (Docket No. 485) deciding the issue of attorney fees and reserved the computation of costs allowable to the plaintiff for a separate memorandum opinion. For the reasons set forth herein, the Court allows an award of costs to the plaintiff in the sum of $11,418.90 which constitutes an additional award beyond the award of costs granted pursuant

to 28 U.S.C. § 1920 in the sum of $2,406.00.[1]

Local 92 has filed a memorandum in opposition to the award of costs. (Docket No. 481). However, the brief in opposition is of little assistance to the Court in determining the appropriate additional award of costs to be paid exclusively by Local 92.

To assist in the determination of the allowable costs, the Court has prepared its own summary of the two cost applications.[2] The first application seeks an award of $10,735.00. The second application seeks an award of costs in the sm of $6,413.65.

II. Summary of the First Application.

The first application seeks an award of $2,520.00 for fax costs and $1,124.00 for copying costs. Although not noted by Local 92, the application also lists costs previously granted the plaintiff by the Memorandum Opinion filed March 15, 1995 pursuant to 28 U.S.C. § 1920 in the sum of $2406.00.

III. The Court's Analysis and Ruling as to the First Application.

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[1] The initial award of costs in the sum of $2406.00 is payable at the rate of 75% by the defendants Matlack and Casol Leasing and at the rate of 25% by Local 92.

[2] Appendix 1 consisting of seven pages is the Court's summary of the first cost application. Appendix 2 consisting of four pages is the Court's summary of the second cost application.

The Court has already indicated it would be guided by the general precepts of 42 U.S.C. § 1988 in its determination of attorney fees and costs in this litigation. Section 1988 speaks in terms of attorneys' fees and does not mention costs. However, it is well settled, particularly in this circuit, that costs may be recoverable under the authority of Section 1988. "The authority granted in section 1988 to award a 'reasonable attorney's fee' included the authority to award those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services. Reasonable photocopying, paralegal expenses, and travel and telephone costs are thus recoverable pursuant to the statutory authority of § 1988." Northcross v. Board of Ed. of Memphis City Schools, 611 F.2d 624 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980).

Although facsimile machines are a relatively new technological development, some cases hold that costs for their use are recoverable under the same rationale as costs for photocopying and telephone calls are recoverable. See, e.g., Halderman v. Pennhurst State School & Hosp., 899 F.Supp. 209, 216 (E.D. Pa. 1995) (fax costs recoverable because attorney "is entitled to take advantage of late twentieth century technology in running his law practice"); David C. v. Leavitt, 900 F.Supp. 1547, 1565 (D. Utah 1995) (fax costs recoverable). However, as with all costs and expenses, the Court limits reimbursement to what is reasonable. Mr. Gilbert lists a charge of at least $15.00 per fax. It appears that the fax charges, all in multiples of fifteen are based on $15.00 a page per fax, but without detailing any basis for the $15.00 per page charge. See NLFC, Inc. v. Devcon Mid-America, Inc., 916 F.Supp. 751, 763 (N.D.Ill. 1996) (courts have denied claims for costs where the per page cost and

number of copies is inadequately identified). Given the experience of the Court's staff, most commercial fax senders charge between $1 and $5 per page. However, such costs include a profit margin, and "[p]rofessionals cannot make a profit by billing an amount over the actual charges." in re Glasstream Boats, Inc., 146 B.R. 784, 785 (M.D. Ga. 1992). In Halderman, supra, the Court reduced the attorney's proposed recovery from $1 per page to 30 cents per page. The total fax charge of $2520.00 divided by 15 equals 168. Based on that computation, because plaintiff's counsel did not provide the details, the Court will permit as costs for faxes the sum of $168.00 rather than the requested $2520.00. Thus, the application will be reduced by $2532.00.

The application also seeks reimbursement for copies in the total sum of $1124.00 based on 25 cents per page. The Court will allow 10 cents per page. consequently, the request for copying costs is reduced to $449.60 requiring a deduction of $774.40 from the application.

As earlier noted, the application also includes the costs previously allowed in the sum of $2406.00.

Based on the above computations, $5,532.60 is deducted from the requested sum of $10,735.00 resulting in an award of costs based on the first application in the sum of $5202.40.

IV. Summary of the Second Application.

The second application seeks $20.00 for faxes at the rate of $5.00 per fax. Based on the above ruling, $16.00 will be subtracted for faxes. The application also seeks $296.50

for copying costs at 25 cents per page. That amount will be reduced to $118.60 resulting in a subtraction of $177.90. The sum of $3.25 for providing copies of the Sixth Circuit ruling to plaintiff's expert (see entry #168) is disallowed. Based on the above computations $197.15 will be reduced from the above application for $6,413.65 thereby providing for a total award of $6,216.50. That sum, when added to the previous award of $5,202.40 equals $11,418.90 which sum constitutes the award of costs payable entirely by Local 92. This sum is in addition to the previously awarded sum of $2406.00.

V. Conclusion.

In its previous opinions filed on April 28, 1997, the Court granted the parties until 4:00 pm on May 16, 1997 to request an evidentiary hearing. See page 21-22. That order remains in effect. Consequently, any requests for an evidentiary hearing with respect to the award of costs must comply with § VI of the April 28, 1997 order.

A copy of this Memorandum Opinion shall be mailed forthwith to counsel of record and to the plaintiff James Wilson at his address of 3825 Hein Avenue, SE., E. Canton, Ohio, 44730.

IT IS SO ORDERED.

s/_____
David D. Dowd, Jr.
U.S. District Judge

FIRST COST APPLICATION OF ATTORNEY EDWARD L. GILBERT

ITEM #	DATE	ACTIVITY	COSTS
6	11-18-91	Filing of complaint	$ 120.00
70	02-14-92	Cost of Facsimilie.	15.00
92	03-13-92	Cost of Facsimilie.	15.00
103	03-20-92	Cost of Facsimilie.	15.00
127	04-23-92 to 04-26-92	Deposition costs (Excluding transcripts):	
		Airline tickets	310.00
		Raddison Delaware	117.17
		Holiday Inn (PA)	63.72
		D.C. Holiday Inn	81.23
		Hertz Rental (3 Days)	119.79
		Parking (3 Days)	31.25
		Meals (3 Days)	81.23
131	04-15-92	Cost of Facsimilie.	15.00
137	04-16-92	Associated Court Reporting - attendance at depositions of Sweet, Nickolas, Albright.	210.00
141	04-20-92	Received Payment toward cost of travel for Depositions from Attorney Sykes' office; recording of same 5:00 PM - 5:15 PM	(520.00)
143	04-20-92	Cost of Facsimilie.	15.00
174	05-05-92	Cost of deposition transcript -- Wilcox & Fetzer, Ltd., depositions of John Solewin and Gerald Trippitelli.	1,064.98
181	05-08-92	Witness Fee for Deposition - Jack Ketchum	40.00
184	05-08-94	Associated Court Reporting - deposition transcripts of Sweet, Nickolas & Albright.	494.40
188	05-11-92	Cost of Facsimilie.	15.00

191	05-13-92	Witness Fee for Deposition - Harold Friedman.	40.00
193	05-13-92	Hill Court Reporters - transcript of deposition of Plaintiffs.	768.90
195	05-13-92	Cost of Facsimilie.	15.00
197	05-13-92	Cost of Facsimilie.	15.00
201	05-15-92	Cost of Facsimilie.	25.00
215	05-19-92	Cost of Facsimilie.	15.00
216	05-20-92	Cost of deposition transcript - Carol J. Thomas Stenotype, for John Doegnes and Charles Piscitello.	803.50
222	05-23-92	Charge for Cuyahoga County Sheriff to Serve Friedman.	18.60
227	05-26-92	Cost of Facsimilie.	15.00
229	05-27-92	Cost of Facsimilie.	15.00
232	04-13-92 to 06-01-92	General Copies - 1,506 Copies @ .30 per copy. Postage. Long Distance Telephone Calls (219).	376.50 57.74 143.44
234	06-02-92	Cost of Facsimilie.	25.00
242	06-06-92	Associated Court Reporting, Inc.- Attendance fee for deposition of Jack Ketchum and transcript of same.	361.60
252	06-13-92	Cost of development of pictures of site- Clicks Store # 55.	6.02
259	06-17-92	Cost of Facsimilie.	65.00
271	06-26-92	Cost of Facsimilie.	15.00
280	06-29-92	Cost of Facsimilie.	20.00

287	07-01-92	Cost of attempted service of subpoena and Notice of Deposition upon Harold Friedman- Process Server, Billy Razor.	125.00
290	07-02-92	Cost of Facsimilie.	15.00
292	06-02-92 to 07-06-92	General Copies- 492 @ $.25 Per Copy. Postage. 8 Long Distance Calls.	123.00 30.75 10.40
294	07-07-92	Cost of Facsimilie.	15.00
301	07-07-92	Cost of Facsimilie.	15.00
304	07-07-92	Cost of Facsimilie.	15.00
309	07-08-92	Cost of Facsimilie.	15.00
315	07-10-92	Cost of Facsimilie.	15.00
329	07-13-92	Cost of Facsimilie.	15.00
334	07-14-92	Associated Court Reporting- Cost for attempted deposition of Harold Friedman, and transcript of proceedings.	64.00
336	07-15-92	Cost of FAX transmittal- 26 Pages.	390.00
347	07-20-92	Cost of Facsimilie.	15.00
356	07-24-92	U.S. District Court- copy of Order.	1.00
358	07-24-92	Cost of Facsimilie (6 parties).	90.00
369	07-30-92	Cost of Facsimilie.	15.00
374	08-07-92	Cost of FAX transmittal- 9 Pages.	135.00
379	08-11-92	Mileage to Deposition- Cleveland, OH- 62 Miles round Trip @ $.30 Per Mile.	18.60
380	08-11-92	Parking for deposition.	8.00

389	08-19-92	Cost of FAX transmittal- 1 Page.	15.00
396	08-20-92	Cost of Facsimilie- 24 Pages.	115.00
398	08-20-92	Cost of Facsimilie- 3 Pages.	20.00
400	08-20-92	Cost of Facsimilie.	15.00
425	09-08-92	Morse, Gantverg & Hodge Court Reporters- Attendancae and Transcript of Deposition of Harold Friedman.	334.30
428	09-09-92	Cost of Facsimilie	15.00
457	09-25-92	Kinko's- Copy, collating and binding of depositions.	59.44
463	09-28-92	Cost of Facsimilie.	15.00
469	09-30-92	Cost of Facsimilie.	15.00
472	10-3-92	Photocopying charges- opposing counsel Corso.	1,392.25
475	10-05-92	Cost of FAX transmittal - 1 Page.	15.00
478	07-13-92	General Copies- 1,327 Copies @ $.25 Per Copy.	331.75
	to 10-06-92	Postage.	57.41
504	10-07-92	General Copies - 32 Copies @ $.25 Per Copy.	8.00
	to 12-15-92	Postage.	5.22
515	12-15-92	General Copies- 480 @ .25 Per Copy.	120.00
	to 01-28-93	Postage.	15.06
523	05-13-93	Kinko's Copy Center for copies.	24.04

524	01-29-93 to 06-08-93	General Copies- 57 @ .25 Per Copy. Postage.	14.25 3.56
563	12-01-93	Cost of Facsimilie.	15.00
568	12-14-93	Cost of Facsimilie.	15.00
570	12-14-93	Cost of Facsimilie.	125.00
573	12-23-93	Cost of Facsimilie.	15.00
583	01-05-94	Cost of Facsimilie.	15.00
587	01-06-94	Cost of Facsimilie.	75.00
589	01-06-94	Cost of Facsimilie.	125.00
592	01-07-94	Cost of Facsimilie.	15.00
594	01-07-94	Cost of Facsimilie.	15.00
599	01-10-94	Cost of Facsimilie.	40.00
604	01-18-94	Cost of Facsimilie.	20.00
607	01-26-94	Cost of Facsimilie.	30.00
609	01-31-94	7 Copies @ $.25 Per Copy.	1.75
610	01-31-94	Postage.	.58
616	02-01-94	Cost of Facsimilie.	25.00
617	02-01-94	15 Copies @ .25 Per Copy.	3.75
618	02-01-94	Postage.	.58
620	02-02-94	16 Copies @ .25 Per Copy.	4.00
621	02-02-94	Postage	.87
623	02-03-94	Cost of Facsimilie.	15.00

625	02-03-94	Cost of Facsimilie.	55.00
628	02-03-94	Cost of Facsimilie.	15.00
630	02-04-94	Cost of Facsimilie.	140.00
632	02-04-94	Cost of Facsimilie.	70.00
640	02-07-94	Cost of Facsimilie.	150.00
648	02-09-94	Cost of Facsimilie.	15.00
651	02-10-94	1 Copy @ .25 Per Copy.	.25
652	02-10-94	Postage.	.29
653	02-10-94	Cost of Facsimilie.	15.00
655	02-10-94	Cost of Facsimilie.	90.00
666	02-13-94	Cost of Facsimilies.	35.00
667	02-13-94	5 Copies @ .25 Per Copy.	1.25
668	02-13-94	Postage.	.58
675	02-15-194	Cost of Facsimilie.	15.00
676	02-15-94	86 Copies @ $.25 Per Copy.	21.50
680	02-15-94	Cost of Facsimilie.	15.00
684	02-16-94	Cost of Facsimilie.	15.00
687	02-16-94	Cost of Facsimilie.	15.00
688	02-16-94	472 Copies @ $.25 Per Copy.	118.00
690	02-16-94	Cost of Facsimilie.	40.00
691	02-16-94	Copies made at U. S. District Court.	13.00

696	02-16-94	Cost of mailing correspondence to John Ciaccio overnight delivery	9.00
698	02-16-94	Fees for 8 witnesses for attendance at trial ($66.00 Each).	528.00
699	02-16-94	Return of witness fee from two witnesses.	(132.00)
701	02-17-94	Parking while at Trial.	2.50
704	02-18-94	Parking while at Trial.	2.50
712	02-22-94	Parking while at Trial.	2.50
715	02-23-94	Parking while at Trial.	2.50
717	02-24-94	Parking while at Trial.	2.50
719	02-25-94	Parking while at Trial.	2.50
722	03-01-94	Parking while at Court.	2.50
723	03-01-94	Cost for LPC Investigations' attempt to serve subpoena upon Solewin.	90.00
		TOTAL	$11,387.00
		Less credits	652.00
		TOTAL	$10,735.00

SECOND COST APPLICATION OF ATTORNEY EDWARD L. GILBERT

ITEM #	DATE	ACTIVITY	COSTS
11	05-16-94	57 Copies @ $.25 Per Copy.	$ 14.25
12	05-16-194	Postage.	4.73
23	06-02-94	Cost of Facsimilie.	5.00
26	06-03-94	Cost of Facsimilie.	5.00
32	06-08-94	43 Copies @ $.25 Per Copy	10.75
33	06-08-94	Postage.	.81
34	06-09-94	Certificate of Service on Supplemental Memorandum.	2.60
36	06-10-94	Cost of Facsimilie.	5.00
39	06-10-94	37 Copies @ $.25 Per Copy.	9.25
41	06-14-194	6 Copies @ $.25 Per Copy.	1.50
42	06-14-94	Postage.	1.74
44	06-16-94	Cost of Facsimilie.	5.00
52	07-08-94	18 Copies @ $.25 Per Copy.	4.50
53	07-08-94	Postage.	1.16
54	07-14-194	Pension Expert costs.	2,725.00
57	08-01-94	266 Copies @ $.25 Per Copy.	66.50
58	08-01-94	Postage.	8.35
64	08-20-94	34 Copies @ $.25 Per copy.	8.50
65	08-20-94	Postage.	2.90

67	08-23-94	14 Copies @ $.25 Per Copy.	3.50
68	08-23-94	Postage.	1.45
72	09-22-94	138 Copies @ $.25 Per Copy	34.50
73	09-22-94	Postage.	1.45
82	01-04-94	5 Copies @ $.25 Per Copy.	1.25
83	01-04-95	Postage.	1.92
84	01-11-95	Cost of copy of trial transcript.	1,269.75
87	01-17-95	182 Copies @ $.25 Per Copy.	45.50
88	01-17-95	Postage.	6.20
96	02-24-95	Overnight Delivery of Reply Brief.	27.00
100	04-03-95	3 Copies @ $.25 Per Copy.	.75
101	04-03-95	Postage	.96
103	04-06-95	2 Copies @ $.25 Per Copy.	.50
104	04-06-95	Postage.	1.92
107	04-18-95	Postage- Reply Brief to Court of Appeals.	26.00
108	04-18-95	Postage (opposing counsel).	1.70
113	05-16-95	32 Copies @ $.25 Per Copy.	8.00
114	05-16-95	Postage.	3.85
115	05-23-95	Cost of copies at U. S. District Court.	20.00
119	05-24-95	21 Copies @ $.25 Per copy.	5.25
120	05-24-95	Postage.	1.28
121	05-25-95	Cost to copy and bind Joint Appendix.	1,309.85

122	05-31-95	Cost of overnight mail delivery to opposing counsel Sykes, Pryatel and Doll- $27.50 Each.	82.50
124	08-07-95	Overnight lodgings in Cincinnati for Hearing.	39.23
126	08-08-95	Parking while at Hearing.	4.00
128	08-07-95 to 08-08-95	Mileage to Cincinnati for Hearing- 520 Miles Round Trip @ $.30 Per Mile.	156.00
130	02-26-96	1 Copy @ $.25 Per Copy.	.25
131	02-26-96	Postage.	.64
135	03-10-96	Mileage to from Akron to Cincinnati for Oral Argument- 260 Miles @ $.30 Per Mile.	78.00
140	03-11-96	Mileage from Cincinnati to Akron- 260 Miles @ $.30 Per Mile.	78.00
141	03-10-96 to 03-11-96	Hotel Room and Tax. Parking.	167.54 13.95
143	05-02-96	13 Copoies @ .25 Per Copy.	3.25
147	05-15-96	26 Copies @ .25 Per copy.	6.50
148	05-15-96	Postage.	2.15
152	05-24-96	43 Copies @ .25 Per Copy.	10.75
154	05-25-96	10 Copies @ .25 Per Copy.	2.50
155	05-25-96	Postage.	.64
159	06-03-96	Postage.	.64
160	06-04-96	309 Copies @ $.25 Per Copy.	77.75

	161	06-04-96	Postage.	3.12
	162	06-06-96	Postage.	.32
26a	163	06-17-96	Postage.	1.01
	164	06-17-96	21 Copies @ .25 Per Copy.	5.25
	165	06-26-96	Copy of Re-Hearing En Bank to opposing counsel Sadler- 6 Copies @ $.25 Per Copy.	1.50
	166	06-26-96	Postage.	1.01
	168	07-18-96	Prepared copies of the Sixth Circuit Ruling for Expert Mr. Leo Maratin- 13 Copies @ .25 Per Copy.	3.25
	171	07-25-96	22 copies @ .25 Per Copy.	5.50
	172	07-25-96	Postage.	1.28
	175	08-01-96	12 Copies @ .25 Per Copy.	3.00
	176	08-01-96	Postage.	2.15
	179	08-06-96	Copy of Memorandum to Client- 4 Copies @ $.25 Per Copy.	1.00
	181	08-07-96	11 copies @ $.25 Per Copy.	2.75
	182	08-07-96	Postage.	.55
	184	08-08-96	8 Copies @ $.25 Per Copy.	2.00
	185	08-08-96	Postage.	.55
			TOTAL	$6,413.65

APPENDIX 6

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed: April 28, 1997]

Case No. 5:91 CV 2348

JAMES WILSON,
Plaintiff,

v.

LOCAL 92,
Defendant.

MEMORANDUM OPINION

I. Introduction.

The judgment for the plaintiff James Wilson as well as this court's earlier decision granting the defendants' summary judgment against the other named five plaintiffs has been affirmed by the Sixth Circuit Court of Appeals. See Wilson v. The International Brotherhood of Teamsters, 83 F.3d 747 (6th Cir. 1996). The Sixth Circuit reversed this court's

decision denying the plaintiff James Wilson's motion for an award of attorney fees and remanded the case for resolution of that issue.

The plaintiff's counsel Edward Gilbert filed an initial application on April 20, 1994 seeking $179,069 in attorney fees as well as $3,592 for law clerk assistance and costs in the sum of $10,735. Following the remand, Gilbert filed a second application seeking additional attorney fees in the sum of $43,971.25 as well as $7,475 for law clerk expenses and additional costs in the sum of $6,413.65.

The remand of the Sixth Circuit provides that only Local 92 shall be assessed the attorney fees. Local 92 contests on many fronts the two applications and has requested an evidentiary hearing.

II. Resolution of the Threshold Legal Issues.

The Wilson court remand states, "Wilson was entitled to recover from the union his reasonable attorneys' fees expended in pursuing his claim against Matlack and Casol Leasing ... because the district court erred in determining that Wilson could not recover his attorneys' fees against Local 92, we REVERSE and REMAND for a further damages hearing consistent with this opinion."

This court's denial of Wilson's application for attorney fees and costs was predicated on the proposition that the case law set forth in Scott v. Local 377, 548 F.2d 1244 (6th Cir. 1977), cert. denied, 431 U.S. 968 (1977), was no longer applicable by reason of the later decision in Summit Valley Indus., v. Local 112, United Brotherhood of Carpenters, 456

U.S. 717 (1982). The Sixth Circuit disagreed. Consequently, the court returns to an examination of Scott to examine the initial objections of Local 92 to the pending applications of Gilbert.

A. The Proper Framework for an Attorney Fees Analysis

Determining the proper framework for assessing the amount of attorney fees to which Wilson is entitled--and in particular examining whether the jurisprudence arising from 42 U.S.C. § 1988 can be a guide--requires a careful historical analysis. In Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), the Supreme Court reaffirmed the "American Rule" with respect to attorney fees, i.e., the general rule that each party pay its own attorney fees, win or lose, in the absence of express statutory authorization to the contrary. In response, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, authorizing district courts, in their discretion, to award a reasonable attorney's fee to prevailing parties in civil rights litigation.

Section 301 does not provide an express statutory authorization for the award of attorney fees. Nevertheless, the Sixth Circuit has held that attorney fees are recoverable in such cases, not in the usual sense but as an element of the plaintiff's damages. The circuit explained its reasoning in Scott, supra, a decision reached two years after Alyeska and one year after the passage of Section 1988:

> We do not read [Alyeska] as in any way affecting those cases in which the attorney fees

> are not an award to the successful litigant in the case at hand, but rather are the subject of the law suit itself. More particularly, we do not under that the decision in Alyeska in any way affects the measure of damages which can be awarded to a prevailing plaintiff in a suit for a breach of a union's duty of fair representation in an action under § 301. . . . To have awarded Scott his attorney fees against [his former employer] would have been in violation of the American rule as set forth in Alyeska. A different situation is presented however, in his action against the Union, for in that action the principal element of Scott's damages is the amount which it cost him in attorney fees and other expenses to do that which the union was obliged but failed to do on his behalf. He was therefore, entitled to include in his damages against the Union the amount which he reasonably expended in attorney fees and other costs in prosecuting his claim against the company, costs which he would not have incurred but for the Union's breach of its duty to represent him fairly and in good faith. [citation omitted].

Scott, 548 F.2d at 1246. The Sixth Circuit cited Scott in its decision in this case, making clear that Scott remains the law of this circuit. As the appeals court stated in the instant case, "In other words, in Section 301 cases the damages arising from a union's breach of its duty of fair representation include the attorneys' fees reasonably incurred in pursuing a claim

against the employer for breach of the collective bargaining agreement." Wilson, 83 F.3d at 753.

Several sub-issues flow from this analysis. The first is created by what appears to be an unusual fee arrangement between Wilson and his counsel, Edward Gilbert. According to the record, Gilbert and the six plaintiffs in this case entered into an agreement whereby Gilbert would be paid $75 per hour for out-of-court work and $85 per hour for in-court work. The rate was increased to $100 and $150, respectively, for appellate work. The agreement apparently included the understanding that if the plaintiffs prevailed Gilbert would petition the court for fees at the rate of $250 per hour and upon receipt of that amount would reimburse the plaintiffs for fees paid. Under this arrangement, Gilbert received some $78,000 from all six plaintiffs. (Jan. 16, 1997, affid. of Gilbert at ¶¶ 17-18). The payments did not distinguish between attorney fees and other costs. Gilbert stated that 41 percent of that amount was chargeable to costs. (March 7, 1997, affid. of Gilbert at ¶7).

Although mindful that the appeals court remanded to determine the reasonable attorney fees "expended" by Wilson in this case, the court is of the view that a determination of attorney fees in this case should be guided by the factors arising out of Section 1988 jurisprudence, including Blum v. Stenson, 465 U.S. 886 (1984); Hensley v. Eckerhart, 461 U.S. 424 (1983); United Slate, Tile and Composition Roofers v. G&M Roofing & Sheet Metal Co., 732 F.2d 495, 502 n.2 (6th Cir. 1984); Pennsylvania v. Delaware Valley Citizens' Council on Clean Air, 483 U.S. 711 (1987); Louisville Black Police Officers Organization v. City of Louisville, 700 F.2d 268 (6th Cir. 1983); Northcross v. Board of Ed. of Memphis

City Schools, 611 F.2d 624 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980); Wayne v. Village of Sebring, 36 F.3d 517 (6th Cir. 1994), cert. denied, __ U.S. __, 115 S.Ct. 2000 (1995).

First, the agreement between Wilson and the six plaintiffs did not presuppose that the hourly figure was solely an "attorney's fee." Gilbert paid costs in the case, which proved to be substantial, out of that fee. Second, limiting the fee award to the dollars actually paid by Wilson to Gilbert would result in an unfair windfall to Local 92. Gilbert would have expended approximately the same amount of time on many of the issues in this case if Wilson had been the only plaintiff. The fact that a number of plaintiffs shared the burden of paying the attorney should not reduce the Union's liability to pay the attorney fees reasonably incurred in litigating the matter.

A second sub-issue is whether the attorney fee issue in a Section 301 case is properly considered by a judge or by a jury. The court is aware that Scott arguably stands, at least by implication, for the prospect that the attorney fee issue in Section 301 cases should be submitted to a jury.[3] However,

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[3] The Scott case to which the court has cited is actually the second time that controversy reached the Sixth Circuit. On the first occasion, the appeals court remanded to the district court to consider the issue of attorney fees as an element of the plaintiff's damages. Scott v. Anchor Motor Freight, Inc., 496 F.2d 276, 281-82 (6th Cir. 1974). The second Scott case noted that "[u]pon remand, the parties waived a jury trial[.]" Scott v. Local Union 377, 548 F.2d 1244, 1245 (6th Cir. 1977). The obvious implication is that the parties would have been entitled to a jury

in the instant case the court notes that no party has requested a jury trial on the attorney fee issue. Indeed the plaintiff's pay arrangement with his counsel, discussed supra, clearly contemplates that attorney fees were anticipated to be a post-judgment matter. Under the circumstances of this case and given the fact that attorney fees are traditionally a matter for consideration by the court rather than by a jury, the court is of the view that it is the proper arbiter of the attorney fees issue. Furthermore, the court will take guidance from the body of case law arising from 42 U.S.C. § 1988.

B. Are the attorney fees that relate solely to the successful prosecution of the case against Local 92 compensable?

Local 92 interprets the language of the decision in Wilson, supra, at page 754 to constitute an appellate direction binding on this court to calculate the allowable attorney fee by deducting the hours devoted to prosecuting the claim against the Local 92.

Wilson could only prevail in this case if he established both a violation of the collective bargaining agreement and a breach of the duty of Local 92 to represent him in the grievance procedure. The attorney fees are to be paid by Local 92. The suggestion that the hours devoted to proving a breach of that duty should be eliminated in the calculation of the attorney fee is in this case without merit. The fees incurred in pursuing both parts of this hybrid action were "necessarily intertwined." Bennett v. Local Union No. 66,

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trial on the attorney fees issue.

958 F.2d 1429, 1440 (7th Cir. 1992). As such, the Court is of the view that any attempt to distinguish fees spent on the claim against the union from fees spent on the claim against the employer is not appropriate.

As a consequence, the court will resolve the hours allowable in the calculation of the attorney fee award without the proposed deduction as suggested by Local 92.

C. Shall the attorney fee award as a measure of damages include or exclude the hours devoted to the appellate phase of this case?

Local 92 reads the remand in a restrictive way and concludes that the omission by the Sixth Circuit granting attorney fees for appellate work leads to the conclusion that they are not compensable as a measure of damages.

In Scott, supra, the Sixth Circuit relied on previous decisions of other circuits, and in particular, Harrison v. United Transportation Union, 530 F.2d 558, 564 (4th Cir. 1975). In Harrison, affirmed the plaintiff's employees successful prosecution of a § 301 case and remanded the case to the district court for the allowance of reasonable attorney fees "in the district court and here." Given the continued reliance on Scott by the Wilson court and citation with approval by the Scott court of Harrison, the court finds that the attorney work required to protect Wilson's judgment at the circuit level as well as successfully advocate Wilson's entitlement to attorney fees is compensable as an appropriate measure of Wilson's damages.

D. Is the plaintiff Wilson entitled to an award of his costs in addition to the attorney fees?

As previously indicated, the Wilson court relied on the Scott decision as still the controlling law. The Scott court clearly indicated that the costs of a successful Section 301 plaintiff were compensable along with attorney fees as it stated:

> He was therefore entitled to include in his damages against the union the amount which he reasonably expended in attorney fees and costs in prosecuting his claim against the company, costs which he would not have incurred but for the Union's breach of the duty to represent him fairly and in good faith. (Emphasis added).

Consequently, the court will consider and award Wilson his costs reasonably expended in prosecuting this case.

E. Does the Court's Previous Award of Costs under the Provisions of 28 U.S.C. § 1920 prevent an additional award of Costs?

By an order entered on March 15, 1995 (See Docket ## 416, 417) the court entered an award of costs under the provisions of 28 U.S.C. § 1920. In the court's view, costs in the context of Scott has a meaning in the context of an award of costs in the typical 42 U.S.C. § 1988 context. Costs in that sense are greater in magnitude than the costs awarded to a prevailing party in the normal case where the American Rule as to attorney fees applies. Costs under the statutory

provisions of § 1920[4] are much more narrow in scope than costs in the § 1988 context. Consequently, the court will not apply the rule of res judicata to the present application for costs, but will delete from the award any sum previously allowed by the court's prior order.

F. Are the Parties Entitled to an Evidentiary Hearing as Requested by Local 92 on the Remanded Issue?

Blum v. Stenson, supra, suggests an evidentiary hearing on the proper amount of fees is required when material facts are disputed such as the dispute over the number of hours claimed. The Manual for Complex Litigation states

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[4] 28 U.S.C. § 1920 provides as follows:

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;
(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
(3) Fees and disbursements for printing and witnesses;
(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
(5) Docket fees under section 1923 of this title;
(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

> The nature and scope of the [fee] hearing to be held by the court will vary with the circumstances of the case. The determination of a fee award should not itself become major litigation. In many cases, the award can be made on the basis of the documentary materials furnished by the parties together with the judges' personal knowledge of the litigation. The parties, however, should be provided the opportunity for an evidentiary hearing whenever there are contested issues of fact.

Manual for Complex Litigation 2d § 24.13 (1985).

The court is of the preliminary view, after reviewing the two applications and the objections thereto, that an evidentiary hearing is not necessary. However, the remand speaks in terms of a "damages hearing" and Local 92 has requested an evidentiary hearing. The court will address a resolution of the issue later in this opinion in § VI.

III. Resolution of Local 92's Specific Challenges to the Two Fee Application.

Local 92 challenges the two applications on a number of grounds. Initially, Local 92 points out that the attorney fee applications make no allowance for the fact that some of the hours claimed must be attributed to the five plaintiffs who lost their case at both the district court and circuit level and therefore must be deducted.

Second, the Union challenges the initial application

because there is no reduction in that application for the hours claimed despite the fact that the plaintiff spent time unsuccessfully pursuing the International Brotherhood of Teamsters and Teamsters Local 507 who were each granted summary judgment against the plaintiff.

Third, the union alleges that the hours that related to the successful prosecution of the plaintiff's Wilson's claim are excessive.

Fourth, the union contends that the hours should be decreased because the plaintiff failed in his pursuit of his claim for punitive damages.

Fifth, the Union challenges the hourly compensation claimed by Gilbert.

Sixth, the Union challenges the hourly rate for outside legal assistance because of the failure of records supporting the amount paid the outside legal research assistants.

Finally, the Union challenges the requested multiplier of 45%. The court turns to an examination of these sub-issues.

A. Should the application as to Hours Allowed be Reduced for time devoted to pursuing claims against Dismissed Defendants International Brotherhood of Teamsters and Local Union 507.

The plaintiffs' complaint jointed the International and Local 507 which had a collective bargaining agreement with

the employer Matlack with respect to the terminal located in Akron. The terminal where the plaintiffs including Wilson had been employed was closed and the drivers for Matlack working out of the Canton terminal belonged to Local 92 rather than Local 507. The court is guided by the teachings in the recent case of Wayne v. Village of Sebring, 36 F.3d 517, 532 (6th Cir. 1994). In that case, presided over by this court, the case was remanded for further consideration of the attorney fee issue because the district court had provided for a reduction in the hours claimed because some of the defendants had been dismissed. The circuit court ruled that on remand the district court was instructed to award all of the non-excessive hours, non-duplicative hours claimed by plaintiffs, undiminished by any theory of "limited success" attributable to time spent on the prevailing defendants. In so deciding, the circuit court found that "no separate claims were raised against the prevailing defendants that were not raised against Sebring itself." Thus, the issue distills to whether the claims raised against the International and Local 507 constituted different claims than the claims raised against Local 92.

The court granted summary judgment to the International and Local 507 by an opinion published on June 14, 1993. (Docket #211). The portion of the opinion granting summary judgment is set forth at pages 15-23 and is attached as Appendix A. The court is of the view that the contentions of the plaintiff represent claims separate from those raised against Local 92 and, consequently, the time claimed by the application will be reduced accordingly. The court has reviewed the application and finds 85.75 hours claimed by Gilbert and 20.91 hours claimed by the legal researcher relate exclusively to the dismissed defendants, the

International and Local 507.[5] Those hours will be stricken. The court will also deduct another 20 hours from the application of Gilbert as some of the time claimed is so general in nature that it reasonably implied that it should be debited against Gilbert with respect to the claims advanced against the International and Local 507.

B. The Hours to be deducted as devoted exclusively to the claims of the Five Dismissed Plaintiffs.

Gilbert correctly points out that the work done for the five dismissed plaintiffs was, of necessity, work also accruing to the benefit of Wilson. However, it is apparent that some of the hours devoted to fighting off the motions of the other parties for summary judgment that resulted in the court's opinion of June 14, 1993 was done in support of the dismissed claims of the five plaintiffs in contrast to work done for Wilson. The court will deduct 10 hours for that work, even though not specifically addressed in Gilbert's very detailed summary of his hours as set forth in the initial application.

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[5] The initial application lists 724 separate entries relating either to attorney fees claimed by Gilbert, legal research or costs. The following entries are excluded from a standpoint of attorney fees and legal research: 12, 13, 24, 25, 27, 28, 31, 36, 39, 45, 46, 51, 52, 62, 65, 69, 74, 75, 80, 81, 87, 88, 90, 95, 105, 107, 108, 109, 110, 111, 113, 114, 115, 154, 156, 158, 159, 160, 161, 185, 192, 205, 222, 237, 248, 251, 253, 254, 277, 281, 285, 286, 287, 288, 316, 318, 320, 334, 335, 339, 343, 344, 345, 349, 354, 357, 362, 375, 381, 384, 407, 416, 425, 426, 436, 447, 448, 449, 451, 454, 482, 488, 493, 494, 503, 505, 506, 525, 527, 539, 540, 541, 542, 547.

Additionally, 8.25 hours are readily identified in the initial application as applying to the five plaintiffs as a result of the court's ruling of June 14, 1993 granting summary judgment against the five plaintiffs.[6] Those hours will also be stricken.

C. The Excessive Hours Claim.

The brief in opposition to the fee application filed by the union sets forth on Attachment B a listing of 44.35 hours that are claimed as excessive. Three challenges merit discussion.

(1) The claim that the eleven hours claimed on three separate days for preparing and filing a status report with the court on June 15, 1992 (Docket 99) and consisting of 19 pages is totally excessive.

The court did request all parties to submit a report. It is without dispute that plaintiff's counsel filed such a report. It is apparently the position of the Union that none of that time is compensable. Such a position is totally without merit. The court has examined the report and finds that a charge of 8 hours is reasonable and will deduct 3 hours.

The second challenge meriting discussion is the claim that plaintiff's counsel claimed 4 hours on an entry at item 263 for reviewing a court order allowing counsel to attend a conference by phone. The court's independent examination

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[6] See entries 539, 541, 542 and 547 in Gilbert's initial application.

of entry 263 indicates that plaintiff's counsel claimed .25 of an hour--not 4.00 hours.

The third challenge is to the 7.85 hours for preparing the fee application. The fee application is about as thorough as one could imagine. The itemization of the entries in support of the application numbers 66 pages. The court will deduct 1.85 hours finding that 6 hours constitutes a reasonable time to prepare the application.

The remaining objections relate to time taken for review of orders and notices. After review, the court will deduct an additional 1.15 hours as excessive.

Consequently, a total of 6 hours will be deducted as excessive charges, not the 44.35 hours as claimed by the union.

D. The claim that hours should be deleted because the plaintiff's claim for punitive damages was denied by the court.

No claim is advanced by the Union that the plaintiff engaged in any discovery to support a claim for punitive damages. Following the teachings of Wayne v. Village of Sebring, supra, the court finds no basis to delete the number of hours because the remedy of punitive damages was disallowed by the court.

E. The Hourly Rate to be awarded to Gilbert.

Gilbert has requested an award of $250.00 for in-court work and $175.00 for out-of-court work. Local 92 argues

that the rates agreed to by Gilbert with the plaintiffs should be dispositive. In a § 1988 context, Blum v. Stenson, 465 U.S. 886 (1984) instructs that reasonable fees "are to be calculated according to the prevailing market rates in the relevant community." The court equates the prevailing market rate to be consistent with what similar services by lawyers of reasonably comparable skills, experience and reputation would command. Such a pronouncement is only the starting point as additional questions arise in considering the prevailing market rates. Should the court recognize the complexity of the action or conversely the simplicity of the case? Should the court calculate what constitutes reasonable hours from the standpoint of the hourly rate granted counsel? If for instance the rate is higher, should the court expect the rate to reflect the expertise of counsel and anticipate that the work to be accomplished in a given case will require less time? Should the court consider the customary hourly rate charged by the attorney requesting fees for non-contingent services? If the attorney performing the work does not on a normal basis charge for non-contingent services, what factors should be applied? Should the persons who specialize in the litigation be entitled to a greater rate because of their experience and knowledge in the field? In short, questions are numerous with respect to determining what constitutes prevailing market rate in the relevant community.

It is the court's view that it should consider the complexity of the work, the community standards as best as they can be established respecting prevailing market rates, the attorney's experience, the attorney's expertise in the field, the manner in which the attorney has performed in the given case and the results obtained. The court finds that affidavits

submitted regarding attorneys' notions of what the relevant rates are in the community are useful but not dispositive.

Gilbert is an accomplished plaintiff's lawyer in civil rights disputes. He is tenacious in pursuit of a client's cause. He has been successful on a number of occasions. In this case, a locally retained lawyer for Local 92 to whom the plaintiff was vociferous in his claims that he had been mistreated, possibly in order to rid himself of Wilson's pleadings, suggested Gilbert as a lawyer who might advance his case. Gilbert was confronted by an impressive array of legal talent in opposition to his efforts for Wilson and the other five plaintiffs. The evidence in this highly controversial and seemingly never ending case has subsequently revealed that Gilbert was charging the individual plaintiffs at a rate far less than the rate claimed in this case. Consequently, the union contends that his allowable rate of compensation should be limited to his agreement with his clients. The court disagrees.

Rather, the court will fix the compensation of Gilbert at a rate it has previously established in other cases where an award of attorney fees has been allowed Gilbert. Specifically, the court will grant Gilbert $125.00 an hour for out-of-court work and $175.00 for in-court work.[7]

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[7] See McDonald v. City of Canton, case no. C86-97A, where the court allowed Gilbert $10 an hour for out-of-court work and $150 for in-court work. This decision was reached in 1989. The instant case was filed in 1991. See also Black Law Enforcement Officer Association v. City of Akron, case nos C85-2781A and C84-2974A, where the court granted $150 an hour for in-court work and $100 for out-of-court work. The court is of the

F. The Contested Claim of $50.00 an hour for outside Legal Research.

The initial fee application includes an application of 71.84 hours at $50.00 an hour. The union contests that claim because there is an absence of proof that Gilbert was actually charged that rate. The price of $50.00 an hour for outside research is indeed modest. However, there is nothing in the record to support the proposition that the outside legal research was accomplished by a person belonging to the bar or proof supporting payment to the outside research in that amount. Payments of $25.00 to $44.00 an hour for para-legal assistance has been approved by this court in the past.[8] Due to the shortcomings above described, the court will reduce the allowance for outside research to $40.00 an hour.

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view that an increase from $100 to $125 an hour for out-of-court work is appropriate and $175 an hour for in-court work is appropriate given the impact of inflation.

[8] The court was assigned to the case of Emery v. City of Cincinnati, Case No. C-1-88-0791 in the Southern District of Ohio. That case dealt with the highly publicized allegations of two former Cincinnati Bell Telephone employees that they had regularly engaged in illegal wire tapping activity at the direction of the Cincinnati Police and the FBI. Eventually, the City of Cincinnati settled the class action case and the court fixed attorney fees in a lengthy opinion that was not challenged. In that opinion, the court allowed para-legal services at the rate of $44.00 an hour.

G. The Union's opposition to the 45% Multiplier.

The fee application includes an application for a multiplier of 45%. Multipliers, once routinely recognized, have fallen into some disfavor. See Pennsylvania v. Delaware Valley Citizens Council, 438 U.S. 711 (1987). One reason advanced for the use of multipliers is the risk factor taken by plaintiff's counsel. A second factor is the delay in receiving compensation. In this case, the swirling controversies[9] raised by the dismissed plaintiffs, Wilson himself and numerous other signers of petitions for Redress of Grievances have resulted in the revelation that Gilbert received a substantial sum of money in fees and costs from the five dismissed plaintiffs in addition to Wilson. Consequently, Gilbert has not been required to wait for compensation as is frequently the case in cases advanced by the army of "private attorneys general" who prosecute civil rights cases. Moreover, the

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[9] After the jury verdict and while the court had under consideration the motions for a new trial or in the alternative a remittitur, pickets including the plaintiff Wilson appeared at the courthouse in Akron, criticizing the court. The court initially considered finding the plaintiff in contempt of court, but later dismissed the contempt proceedings. See Docket ##375, 376, 377 and 382. After the appellate procedures were completed and the case remanded for a determination of the attorney fee award, the five plaintiffs who lost their case and the successful plaintiff, Wilson filed several documents styled "Petitions for Redress of Grievances" which called for grand jury action against the court as well as the commencement of impeachment proceedings against the district court and the three circuit judges who decided Wilson, supra. See Docket ##450, 457 and 478.

issue of a multiplier appears limited to those civil rights cases where 42 U.S.C. § 1988 applies as opposed to § 301 cases. As a consequence, the motion for a multiplier is denied.

H. Summary as to the Determination of Attorney Fees Based on the Initial Application.

The initial application claims a total of 616.85 hours for out-of-court work and 62 hours for in-court work on behalf of Gilbert. The application also claims 71.84 hours for legal research. For the reasons set forth above, 130 hours is deducted from Gilbert's time and 20.91 hours for legal research. Local 92 complains that the time devoted to waiting for the jury decision amounting to approximately 9 hours should not be counted as in-court time, but rather out-of-court time. The court agrees. Consequently, the out-of-court time of 486.85 hours will be increased by 9 hours to a total of 495.85 hours and the in-court time will be reduced to 53 hours.

Based on those decisions, the following calculations apply:

Mr. Gilbert:

495.85 hours for out-of-court work x $125 = $61,981.25

53.00 hours for in-court work x $175 = 9,275.00

Legal Research:

50.93 hours x $40 =	$ 2,037.20
TOTAL	$73,293.45

IV. Resolution of the Second Application for Attorney Fees (Post Verdict and through the Appeal).

In the second application, Gilbert makes claim to the same hourly rate for compensation and moves for an award of an additional $57,860.46. Local 92 has filed a single brief which challenges both applications. Again, Local 92 challenges the hourly rate and raises claims that the claimed hours are excessive or were devoted to the failed claims of the five dismissed plaintiffs.

Gilbert claims 169 hours of out-of-court work and three hours of in-court work. An additional 149.51 hours are claimed for the outside research work at the rate of $50.00 an hour.

The court's previous rulings as to compensation as set forth above will apply to the second application.

A. The excessive time challenge.

The court finds that the time claimed for the following entries should not be credited to Gilbert as Local Union 92 bears no responsibility for those times charged. Those entries are ## 60, 69, 80, 81, 85, 99, 102, 123, 125, 127, 129, 142, 145, and 156. The entries total 18.25 hours for out-of-court work and one hour for in-court work.

The court also finds that 3.00 hours have been charged to the mediation process put in place by the court after the verdict. Those hours are not chargeable to Local Union 92.

Additionally, the court has considered carefully the entries in the second application and finds the following entries excessive as to the hours claimed in the amount set forth in the parenthesis: Entry #2 (2.00); Entry #3 (1.50); Entry #5 (1.00) and Entry #173 (.50) for a total of 5 hours to be deducted as excessive.

Finally, the court must take into consideration that the appeal included the claims of the five plaintiffs which were lost when the court granted the defendants summary judgment. Those plaintiffs challenged the court's ruling on appeal and lost. The appeal in its totality included the failed challenges by the major defendants to the jury verdict, the successful challenge to this court's ruling denying the requested award of attorney fees and the unsuccessful challenge by the five plaintiffs. The court does not have the benefit of the appellate briefs and it did not attend the argument before the Sixth Circuit and so it can only engage in an estimate of the time that Gilbert devoted to the five plaintiffs. The court finds that a factor of 25% is reasonable and so the time devoted on appeal in terms of research by the outside legal research entity and Gilbert's work in briefing and participating in the preparation of the joint appendix will be reduced by a factor of 25%.

The court finds that the outside research devoted a total of 105.8 hours to that task and that number will be reduced by 26.45 hours. The court finds that Gilbert devoted 37.50 hours to preparation of the briefs on appeal and the

preparation of the joint appendix. That allocation will be reduced by 9.375 hours.

Gilbert claims a total of 169 hours in out-of-court work in the second application. The court finds that calculation is supported by the application. Based on the court's rulings as to reductions, 35.625 hours will be deducted from the 169.00 hours allowing for a total of 133.375 hours for out-of-court work in the second application.

Gilbert claims a total of 149.50 hours by the out-of-court law clerk. That calculation is supported by the court's review of the application. Based on the foregoing 26.45 hours will be deducted from the 149.50 hours allowing for a total of 123.05 hours for the out-of-court law clerk in the second application.

Summary

Mr. Gilbert:

133.375 hours for out-of-court work x $125 =	$16,671.87
2.00 hours for in-court work x $175 =	350.00
Legal Research:	
123.05 hours x $40 =	$ 4,922.00
TOTAL	$21,943.87

V. Summary of the Two Calculations for Attorney Fees.

Based on the calculations as set forth in § III and § IV, the court finds that the plaintiff James Wilson and his counsel Edward Gilbert are entitled to a judgment in the sum of $95,237.32 for attorney fees which includes the allowance for legal research. That sum, when reduced to judgment, shall be subject to interest computed from the day of the judgment and as determined by law.

VI. The Procedure to be Followed Prior to the Entry of Judgment.

The court will file the appropriate judgment entry in this case consistent with this Memorandum Opinion unless one or more of the parties request an evidentiary hearing following a study of this opinion. The request must be filed by 4:00 p.m. on May 16, 1997 and shall be accompanied with a description of the testimony to be offered with a designation of the issues that the testimony is designed to address.[10]

VII. The entitlement to Reimbursement by Wilson of his Previous Payments to Gilbert for attorney fees and costs.

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[10] This Memorandum Opinion does not resolve the issue of costs. A separate Memorandum Opinion will be filed within the next week addressing the issue of costs. Any request for a hearing that is related to the court's ruling on costs must also designate the testimony to be received in the issue or issues to which the testimony is to be directed as to costs.

The court's judgment will require that Local 92 pay into this court though the Clerk's Office the monies required to satisfy the judgment as it relates to the award of attorney fees and costs. Upon notice that the monies have been deposited with the court, the court will be required to determine how much of that payment should be refunded to Wilson to make him whole for the monies previously paid to Gilbert. The balance shall be paid to Gilbert. The attorney-client relationship between Gilbert and Wilson appears irrevocably shattered by Wilson's public denunciations of Gilbert. (See Docket #450). It seems apparent that Gilbert and Wilson will be unable to agree on what constitutes the appropriate payment back to Wilson. Moreover, Gilbert's motion to withdraw as counsel of record for Wilson has been granted given the total breakdown of the attorney-client relationship. See Docket ## 462 and 483.

Once the issue is joined by the payment into court of this court's order, the court will refer the issues of how the monies should be split to Magistrate Judge James A. Gallas for a Report and Recommendation.[11]

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[11] By an order filed on February 25, 1997 (Docket #472), the court indicated that Wilson is entitled to a refund of the monies he has paid Gilbert as fees and costs. Subsequent pleadings indicate the existence of a dispute between Wilson and Gilbert as to the monies to be allocated to Wilson's fees and expenses. Although the constant attacks by Wilson on the integrity of this court suggest recusal, the court has decided against recusal in the view that it retains the experience with this case and the necessary patience and judgment to resolve all aspects of this continuing dispute. However, the court is of the view that the conflict between Wilson and Gilbert should first be addressed by the Magistrate Judge.

In the event Gilbert and Local 92 should arrive at a settlement of the issue of the attorney fees and costs, it shall first be presented to Wilson to give him the opportunity to object to the settlement on the limited ground that the size of the settlement will not permit him to recapture the monies he advanced for payment of his legal fees and costs. In any event, Local 92 shall pay into court the funds required to satisfy the judgment or settlement as the case may be.

VIII. Conclusion.

The court is optimistic that this opinion will serve as a basis for a settlement of the attorney fee issue. However, if the court's optimism is misplaced and the conflict continues, the procedures set forth in § VI will govern the completion of the attorney fee and cost dispute as between the plaintiff, Gilbert and Local 92.

In the absence of a timely objection as described in Section VI, a judgment entry will be entered awarding judgment to the plaintiff James Wilson and his counsel, Edward Gilbert, against Local 92 in the sum of $95,237.32[12]

Hence, the decision to refer that issue to the Magistrate Judge after the monies have been paid by Local 92 into the Clerk's Office. The court notes that the compensatory judgment plus interest has been paid into court by Local 92 and Matlack and those funds have been distributed to Wilson. See Docket #475 directing the payment of $151,753.65 to Wilson.

[12] The amount of the judgment will be increased by the amount of the award for costs as to be set forth in the subsequent Memorandum Opinion.

as the award of attorney fees together with interest thereon from the date of the judgment as computed according to federal law with the mandate that the monies necessary to pay the judgment be deposited by the defendant Local Union 92 directly with the clerk of this court.

A copy of this Memorandum Opinion shall be mailed forthwith to counsel of record and to the plaintiff James Wilson at his address of 3825 Hein Avenue, SE., E. Canton, Ohio, 44730.

IT IS SO ORDERED.

s/_____
David D. Dowd, Jr.
U.S. District Judge

* * *

Court finds that Wilson should reasonably have discovered the existence of the Akron terminal on May 20, 1991. Since the Complaint was filed within six months of that date, the suit is timely as filed.[7]

While Wilson has raised genuine issue of material fact regarding Matlack's and Casol Leasing's conduct under the terms of the CBA, his hybrid § 301/fair representation claim can survive only if he can demonstrate that one of the defendant unions breached its duty of fair representation. Talbot v. Robert Matthews Distributing Co., 961 F.2d 654 (7th Cir. 1992); and White v. Anchor Motor Freight, Inc.,

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[7] The Court notes that there is some discrepancy in Wilson's deposition as to whether he learned of the Akron terminal on May 18 or May 20, 1991. If Wilson was aware of the Akron terminal on May 18, 1991, then his case was filed six months and two days; two days beyond the statute of limitations. However, if he did not learn of the Akron terminal until May 20, 1991 then his Complaint is timely. This factual dispute must be resolved by a jury.

Matlack argues that even if Wilson did first discover Matlack terminal on May 20, 1991, his Complaint is still untimely as it was filed 182 days later. However, in applying statute of limitations, the court must look to the language of the statute and apply the time measurements as they are described. See Schafer v. Aspen Skiing Corp., 742 F.2d 580 (19th Cir. 1984). Section 10(b) of the National Labor Relations Act, from which the statute of limitations is borrowed for hybrid §301 claims, calls for a six *month* period not a one hundred eighty *days* period. Assuming Wilson first became aware of the Akron terminal on May 20, 1991, his claim was filed within six months and is therefore timely.

899 F.2d 555 (1990). The Court will now examine the claims against the union defendants.

B. International Brotherhood of Teamster's Summary Judgment Motion.

Defendant IBT moves for summary judgment alleging that it owes

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no duty of fair representation to Wilson because IBT is not the exclusive collective bargaining representative for Matlack employees, that IBT is not a signatory to the Matlack/Local 92 collective bargaining agreement, and that neither Local 92 nor Local 507 was acting as an agent for IBT, and therefore IBT had no control over its local affiliates' conduct.

Wilson acknowledges that IBT is not the exclusive collective bargaining representative for Matlack's employees, and that IBT is not a signatory to the Matlack/Local 92 collective bargaining agreement. However, Wilson claims that "a material factual dispute exists regarding the issue of whether Local 507 was acting as an agent for the International during Local 507's organizational activities at Matlack's Akron terminal." (Plaintiffs' brief in opposition at 8).

In general, in order to impose a duty of fair representation, a union must be either the exclusive collective bargaining representative, or a signatory to the collective bargaining agreement. Vaca v. Sipes, 386 U.S. 171 (1967); Sine v. Teamsters Local 992, 730 F.2d 964 (4th Cir. 1984); and Teamsters Local 30 v. Helm Express, Inc., 591 F.2d 211

(3rd Cir. 1979), cert. denied, 444 U.S. 837 (1979). Absent any ties to the collective bargaining process or agreement, the International Union may be held liable if it is determined that the local was acting on behalf of the International Union as an agent. Fristoe v. Reynolds Metals Co., 615 F.2d 1209 (9th Cir. 1980); and Baker v. Newspaper & Graphics

Comm., 628 F.2d 156 (D.C. Cir. 1980).

In finding the absence of an agency relationship between the local and the International, the Sixth Circuit observed in Shimman v. Frank, 625 F.2d 80, 98 (6th Cir. 1980) that:

> The International Union is a separate body from the local. The acts of the local and its agents cannot automatically be imputed to the International. This is clear from the International Union of Operating Engineers' Constitution which defines the relationship between the International and its affiliated locals. Under the constitution, local unions govern themselves and transact business on their own behalf. Local unions can call strikes on their own, except when a collective bargaining agreement is in existence or when the local union desires the International's help with strike benefits. Local unions elect their own officers, pass their own by-laws, transact business and discipline members.

Similarly, IBT exercises limited control over its local affiliates. Local unions maintain their own bank accounts and manage their own real and personal property. Also pursuant to the International Constitution, local affiliates adopt their own bylaws, subject only to the International Constitution, elect or appoint their own officers, elect or appoint their own business agents, establish and collect their own dues, maintain their own treasures, invest in real or personal property, negotiate loans, handle their own disciplinary problems, organize their own campaigns, negotiates contracts, and call and conduct strikes. Since it is evident that IBT does not control the daily activities of its locals, it does not owe a duty of fair representation to any of its affiliates' members, including Wilson.

Notwithstanding the International Constitution and the

autonomy it provides local unions, Wilson argues that Local 507 was acting as IBT's agent, and that therefore, IBT is liable to Wilson for the conduct of Local 507's officials. The only evidence Wilson advances in support of this proposition is the deposition testimony of Harold Friedman[8] who testified that Jackie Presser, former President of IBT, personally controlled Local 507. Mr. Friedman testified that:

Q: It's my understanding that you were president of Local 507.

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[8] Harold Friedman was a past president of Local 507.

A: Right, right.

Q: It's also my understanding that Jackie Presser was secretary/treasurer.

A: Right, right.

Q: Now, in terms of the organizational chart, who was in charge?

A: We kind of--he took care of his part of the organization in various things, and I took part in various things. We split the responsibilities between us.

Q: Well, who had the authority, who had the final say on issues dealing with 507, then, while he held the position; that is, Presser held the position as secretary/treasurer, and you had the position as president?

A: Executive board really has the final say.

Q: Well, were you both of equal status on your organizational charts?

A: It was never established equal or otherwise, Presser had his things to take care of, I had mine to take care of. If I wanted to do something, I'd tell him, he'd tell me, just like in any

organization.

Q: Was the final say then with Mr. Presser, with you, or the Board?

A: Final say is with Mr. Presser, let's say. He was International president, I think that would give him a little clout.

Q: Well, that's what I'm trying to get to then. Even on 507 affairs, Mr. presser then had the final say; is that what you're saying?

A: I would say so.

(Deposition of Friedman at 42-43).

An International Union is not liable for the actions of a local union official simply because he is also an officer of the International. Shimman, supra. To be liable, the International officer must have been acting on behalf of the International. Id. Wilson offers no evidence beyond Mr. Friedman's statement that Jackie Presser "had final say" to demonstrate that his actions were taken on behalf of the International. Wilson does not provide any evidence to indicate what, if any, actions Jackie Presser took in regard to the Local 507/Casol bargaining agreement or whether Mr. Presser's actions, if any, were done in his capacity as an officer of IBT. As such, Mr. Friedman's statement does not rise above the level of a scintilla of evidence, and is insufficient to stave off a summary judgment motion.

C. Local No. 507 Summary Judgment Motion

Wilson also alleges that Local No. 507 (Local 507) breached its duty of fair representation, when it sought a contract with Matlack and/or Casol Leasing to cover the workers at the Akron

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facility. Additionally, Wilson claims that Local 507 conspired with Matlack to deny Wilson his reinstatement rights. Local 507 has moved for summary judgment claiming that it owes no duty of fair representation, and for this reason cannot be held liable for its organizational activities at the Akron plant. This Court agrees with Local 507's position.

It is well settled that, generally, a union's duty of fair representation runs only to the members of its collective bargaining unit. Schneider & Storage Co. v. Robbins, 446 U.S. 364 (1984); Vaca v. Sipes, 386 U.S. 171 (1967); Humphrey v. Moore, 375 U.S. 335 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); and NLRB v. Whiting Milk Corp., 342 F.2d 8 (1st Cir. 1965).

In Brotherhood of Railroad Trainment v. Howard, 343 U.S. 768 (1952), the Court extended the duty of fair representation beyond the bargaining unit, holding that "bargaining agents who enjoy the advantages of federal labor law must execute their trust without lawless invasions of the rights of other workers." Id. at 774.

The union defendant in Howard, the Brotherhood of Railway Trainmen, had for years attempted to use its

influence to eliminate blacks from employment with the railroad and give those jobs to the white men who were members of the union. The black train porters were represented by another union and performed essentially the same work as brakemen. By threat of strike, the Brotherhood forced the employer railroad to agree not to permit train porters, who were mostly black, to perform any of the duties of brakemen, which

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essentially resulted in the discharge of all the black train porters. The Howard Court extended the duty of fair representation to the black train porters even though they were not members of the Brotherhood Union because it was improper for an exclusive bargaining agent to discriminate on the basis of race.[9]

It is Local 507's position that Howard was limited to situations involving racial or other forms of unlawful discrimination that preclude non-union members from obtaining union membership. In response, Wilson notes that

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[9] Specifically, the Court held:

> [D]iscriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations.

Id. at 773, *quoting*, Steele v. L & N.R. Co., 323 U.S. 192, 203 (1944).

the Howard decision has not been limited to instances of racial discrimination.

At issue in Jones v. Trans World Airlines, Inc., 495 F.2d 790 (2d Cir. 1974), was the question of whether it was appropriate for the union and the employer to agree to "end tail" the seniority of a group of employees, in January of 1970, who prior to that time had been employed by the employer but had not become members of the union until July of 1970. The Second Circuit, relying on Howard, held that "it is clear that a union may conduct itself in a manner so arbitrary or malicious vis-a-vis an outside group that it exceeds the limit imposed by the duty of fair representation." Id.

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at 796.

The Jones decision carries little weight here as the plaintiffs in Jones were *members of the bargaining unit* and, thus, the union owed a duty of fair representation to them even if they did not actually become *members of the Union* until after the new contract was negotiated.

In Chemical Workers v. Pittsburgh Glass, 404 U.S. 157 (1971), the Court revisited Howard and, in holding that certain retirees of the defendant company who were not members of the union were owed no duty of fair representation, limited the reach of Howard:

> Since the retires are not members of the bargaining unit, the bargaining agent is under

> no statutory duty to represent them in negotiations with the employer. Nothing in Railroad Trainmen v. Howard, 343 U.S. 768 (1952), is to the contrary. In Howard, we held that a union may not use the powers accorded it under law for the purposes of racial discrimination even against workers who are not members of the bargaining unit represented by the union. The reach and rationale of Howard are a matter of some conjecture. But whatever its theory, the case obviously does not require a union affirmatively to represent non-bargaining unit members or to take into account their interests in making bona fide economic decisions in behalf of those whom it does represent.

Id. at 181, n. 20.

Wilson has not brought forward any evidence which would suggest that Local 507's conduct was arbitrary or malicious, invoking the duty of fair representation to individuals outside of the bargaining unit. In fact, all of the undisputed facts would suggest that Local 507 was not even aware of the possibility that Wilson, or any other former employee of the Canton terminal, was entitled to reinstatement at the Akron facility. Plaintiff

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testified that he did not file grievances with Local 507 or otherwise bring the problem to the attention of the officials of

Local 507. Wilson Depo. at 115-121.[10] Also, Local 507 Business Agent Robert Sweet testified in his deposition that he was unaware of any reinstatement rights that Wilson, or other former Canton terminal employees, might have had. Sweet Depo. at 47-48.

Since there are no genuine issues of material fact regarding Local 507's duty of fair representation, and the undisputed facts suggest that no such duty is owed to Wilson, the Court grants Local 507's motion for summary judgment.

D. Local No. 92 Summary Judgment Motion.

In bringing suit against Local No. 92, Wilson alleges that Local No. 92 breached its duty of fair representation with regards to pursuing Wilson's right to obtain employment at the Akron facility. The Court finds the existence of genuine factual disputes; thus, foreclosing the possibility of summary judgment on Wilson's claim against Local 92.

A union that is the exclusive bargaining representative for employees in a particular bargaining unit owes a duty to fairly represent its members both in the collective bargaining process, as well as in "enforcing . . . the resulting collective bargaining agreement." Vaca v. Sipes, 386 U.S. 171 (1966). "A breach of the

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[10] Neither did any of the other plaintiffs. Wadding Depo. at 49; Schmitt Depo. at 53; Claybourne depo. at 32; Lyons Depo. at 32, 34-36; and Kerr Depo. at 63-64.

APPENDIX 7

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed: February 26, 1999]

Nos. 97-3668/97-3672

JAMES WILSON,
Plaintiff-Appellee,

TIMOTHY R. WADDING, et al.,
Plaintiffs,

v.

THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, et al.,
Defendants,

GENERAL TRUCK DRIVERS AND HELPERS LOCAL UNION 92,
Defendant-Appellant.

ORDER

BEFORE: MARTIN, Chief Judge; KENNEDY and SILER, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/_____
Leonard Green, Clerk

Supreme Court, U.S.
FILED
JUN 8 1999
CLERK

No. 98-1921

IN THE
SUPREME COURT OF THE UNITED STATES

GENERAL TRUCK DRIVERS AND HELPERS UNION LOCAL NO. 92, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO,

Petitioner,

v.

JAMES WILSON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT'S OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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A. JURISDICTIONAL GROUNDS

1. The Respondent Objects to this Petition for Writ of Certiorari on the Grounds That the Petitioner Did Not File it in a Timely Manner, and Used Incorrect Format in the Petition

This Court does not have jurisdiction to hear this matter because of the untimely filing of the petition and the refusal of the petitioner to use the proper format. Pursuant to Rule 13 of the Rules of the Supreme Court, a petition for a writ of certiorari to the Supreme Court shall be deemed in time when it is *filed* with the Clerk within 90 days after the judgment entry. *See* Rules of the Supreme Court, Rule 13.1.

> "The Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time." *See id.* at Rule 13.3.

In the present case, the petition for writ of certiorari was not received by this Court until May 28, 1999, 91 days following the Sixth Circuit's denial of the petition for rehearing en banc. The Respondent respectfully requests that this Court take note that the petition has a filing date of May 27, 1999 only because the petition was postmarked on that date.

> "To 'file' a paper requires its *delivery* to the proper office." *Meckes v. Reynold Metals Co.*, 604 F.Supp. 598, 601 (N.Dist.D.C. Ala., 1985).

> "A document has not been 'filed' with or 'returned' . . . until it has been actually received . . . and mere mailing is not enough." *Blades v. U.S.*, 407 F.2d 1397, 1399 (9th Cir. 1969).

> "A document is not usually 'filed' when it is deposited in mails . . . " *Wirtz v. Local Union 169, Intern. Hod Carriers, Bldg. & Common Laborers' Union of America, AFL-CIO,* 245 F.Supp. 741, 750 (U.S.Dist.Ct. Nevada, 1965).

Due to the Petitioner's refusal to follow the rules of this Court, the petition was not received in a timely manner, and it is improper for the Court clerk to view it as having been filed within the 90 day time limit.

Further, the inaccuracies in the content and style of the submitted materials also violate the rules of this Court. Pursuant to Rule 33.1 (d) of the Rules of the Supreme Court, every document must be produced on opaque, unglazed paper 6 1/8 by 9 1/4 inches in size, with type matter approximately 4 1/8 inches and margins of at least three-fourths of an inch on all sides. The added "appendix" portion of the petition uses 8 1/2 by 11 inch paper folded inside the binding of the petition at pages 16a-26a.

Rule 33.7 of the Rules of the Supreme Court states,

> "The Clerk shall not accept for filing any document presented in a form not in compliance with this Rule . . ."

The Respondent respectfully submits that this Court should weigh these additional factors as evidence that this petition for writ of certiorari should not be granted.

B. STATEMENT OF FACTS

The Respondent concurs with the general Statement of Facts as stated by the Petitioner on page 3 of the Petition for Writ of Certiorari, with the exception of footnote 1 on page 3.

C. STATEMENT OF THE CASE

1. It Would Be Improper for this Court to Revisit the Issue of Attorney Fees Because the Petitioner Failed to Make a Timely Objection to the Previous Ruling, and Certiorari Was Already Denied on this Case.

In it's April 28, 1997 opinion, on remand from the Court of Appeals, the District Court filed a memorandum on the issue of attorney fees owed to Respondent and his counsel in this case, and gave the parties leave until May 16, 1997 to request an evidentiary hearing. *See* Docket No. 485. The Court did not receive a request for an evidentiary hearing from either party by this deadline, and subsequently awarded judgment to Respondent Wilson and his counsel, Edward Gilbert, in the sum of $106,656.22. *See id.*

After the expiration of this deadline, Petitioner subsequently filed a motion seeking relief from judgment, which the Trial Court denied for untimeliness in it's memorandum and order dated May 29, 1997. The Court deducted the sum of $2,168.82 in costs, however, finding this amount to be related to Respondent's failed action against dismissed defendants, thereby entering judgment in favor of the Respondent and his counsel in the sum of $104,487.40. See id.

The Petitioner filed a timely appeal on the issue of attorney fees following the District Court's ruling for Respondent Wilson and his counsel. On December 22, 1998, the Sixth Circuit Court of Appeals affirmed the ruling of the District Court.

On December 30, 1998, the Petitioner requested reconsideration and clarification of the Appellate Court's ruling.

On January 12, 1999, the Appellate Court issued another order and clarified their previous order, affirming the decision of the District Court.

The Petitioner submitted a petition to the Court of Appeals for a rehearing en banc, which was denied on February 26, 1999. *See* Docket No. 97-3668/97-3672. The Court of Appeals stated that the panel reviewed the petition for rehearing and concluded that the issues raised in the petition had been fully considered upon the original submission and decision of the case. *See id.*

D. GENERAL BACKGROUND

In it's April 28, 1997 and May 29, 1997 rulings, the District Court addressed Petitioner's objections to Respondent's counsel's application for attorney's fees. *See James Wilson v. Local 92*, Case No. 5:92 CV 2348 (1997). The Court took great care to review the petition and reduced the amount originally requested by the Respondent by 58.5% (resulting in a reduction of $146,768.86) by reviewing the following categories:

1. The District Court dismissed the hours devoted to pursuing claims against the dismissed defendants.

From it's grant of Summary Judgement to the International Brotherhood of Teamsters and Local Union 507 (June 14, 1993), the Court found that the contentions of the Respondent represented claims separate from those raised against Local 92 and reduced Attorney Gilbert's fees accordingly. The Court found 85.75 hours claimed by Gilbert and 20.91 hours claimed by the legal researcher related

exclusively to the dismissed defendants. The Court also deducted another 20 hours from Gilbert, as some of the time claimed was viewed as being "general in nature."

2. The District Court dismissed the hours devoted to pursuing the claims of the five dismissed plaintiffs.

The District Court deducted 10 hours for work Gilbert did in support of the dismissed claims of the five plaintiffs, as well as 8.25 hours which were readily identified as applying to the five plaintiff's, as a result of the June 14, 1993 ruling of summary judgment against the five plaintiffs.

3. The District Court dismissed excessive hours, pursuant to Defendant's Brief in Opposition to Attorney Gilbert's fee application.

The District Court dismissed 6 hours as excessive charges. Specifically, the Court deducted 3 hours from the time claimed as preparation for plaintiff's status report, 1.85 hours from preparing the fee application, and 1.15 hours from review of orders and notices.

Continued in their April 28, 1997 decision, the District Court reduced the following hours claimed by Attorney Gilbert post verdict and through appeal, pursuant to Petitioner's challenge:

4. The District Court dismissed excessive hours pursuant to Petitioner's challenges.

The District Court reduced the hours which were charged to the Petitioner by 18.25 hours for out-of-court work and one hour for in-court work. The Court also found that 3.00 hours that were charged to the mediation process should not be chargeable to Local 92. Additionally, the Court deducted 5 hours as excessive. Finally, the Court considered that the appeal included the claims of the five plaintiffs which were

lost when the court granted the defendants summary judgment. The Court reduced the time devoted to the appeal by Gilbert and the outside legal research entity by a factor of 25%. The Court reduced the hours of outside research by 26.45 hours and Gilbert's hours by 9.375 hours. Also, the Court reduced Gilbert's out-of-court work hours by 35.625 hours and Gilbert's out-of-court law clerk's hours by 26.45 hours.

In their May 2, 1997 ruling the District Court ruled on the following costs allowable to the Respondent.

5. The District Court reduced the costs claimed for fax and copy services.

The Court reduced the costs claimed in the first application for faxes by $2532.00 and reduced the request for copying costs by $774.40. The Court also subtracted $16.00 from the costs claimed for faxes and $177.90 for the copying costs in the second application. An additional $197.15 for the cost of providing copies of the Sixth Circuit ruling to Respondent's expert was also subtracted.

6. The District Court amended the Judgment Entry.

In it's June 17, 1997 Amended Judgment Entry, the District Court reduced the original judgment by $2,168.82, pursuant to Local 92's contention that this sum related to Respondent's failed action against the dismissed defendants.

As noted above, Respondent's counsel received only 58.5% of the originally requested costs and Attorneys Fees, resulting in a reduction of $146,768.86 from the originally requested amount. The District Court's careful scrutiny of every hour charged to Wilson's case is indicative of the fact that this Petition for Writ of Certiorari is unwarranted, as the issues have already been carefully considered by both the

United States District Court for the Northern District of Ohio and the Sixth Circuit Court of Appeals.

E. ADDITIONAL REASONS AGAINST GRANTING THE WRIT

1. The Sixth Circuit Correctly Required the Union in this Hybrid 301 Case to Pay the Respondent's Attorney Fees Incurred in Pursuing His Claims Adverse to the Union

The Sixth Circuit ordered, upholding the District Court's decision, that the Union should be required to pay the Respondent's attorneys fees incurred in (1) the claims against the employer defendants and (2) the claims against the Union. The Petitioner argues that the Sixth Circuit decision is contra to prior rulings and unsupported by any statutory authority, case law or policy reasoning. This is not so.

It is within the sound discretion of the District Court to apportion all attorneys fees against the Union as consequential damages in a sec. 301 action. *See e.g. Parker v. Local 413,* 501 F. Supp. 440, 450-51 (S.D. Ohio 1980); *Achilli v. John J. Nissen Baking Co.*, 989 F.2d 561, 565-66 (1st Cir. 1993) (apportionment of attorneys fees "primary for the court to make."). Furthermore, A prevailing plaintiff is entitled to recover the following as consequential damages against his Union under sec. 301: the reasonable attorneys fees "he would not have incurred but for the Union's breach of duty to represent him fairly and in good faith. In other words, the plaintiff should be allowed to recover attorneys fees which would not have existed had the Union not failed in its duty to represent him. This "but for" test is easily met since "the Union...made this [entire sec. 301 hybrid] litigation unavoidable by turning a virtually deaf ear to the plaintiff." *See Parker* at 450-51. Hence an award including attorneys

fees and expenses incurred in the respondent's claims against the Union itself does not raise different issues.

Because the fees attributable to both the employer and the Union were too "intertwined" to distinguish between, the Sixth Circuit correctly affirmed the District Court's exercise of discretion against attempting to do so. Petitioner is attempting to argue that the "intertwined" doctrine does not apply due to an absence of outright collusion between the employer and the Union. However, the Petitioner has failed to recognize that "intertwined" is not limited to cases of collusion. Specifically, this Court has held that intertwined means that the legal effort was "devoted generally to the litigation as a whole," and that the legal effort relating to the claims against the Union contributed to the "'ultimate result'" of the plaintiff's hybrid action against the Union and employer both. *See Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). The standard set by this court in *Hensley* is easily met. The legal effort expended is devoted to the entire general litigation. The award including attorneys fees and expenses incurred in the respondent's claim against the Union is part and parcel of the whole claim. By ignoring the concerns of the respondent, the petitioner made the entire sec. 301 claim possible. Accordingly, the Sixth Circuit decision, upholding the award of attorneys fees against the Union itself, is correct. Furthermore, the Sixth Circuit rightly recognized and upheld the discretionary power of the District Court to apportion the attorneys fees against the Union as consequential damages. Also, the claims against the employers and the Union were so intertwined that any attempt to separate the fees among the two parties would be highly inappropriate.

2. The Sixth Circuit Properly Affirmed the Award of Attorneys Fees and Costs Which Were Not Excessive with Respect to the Amount Actually Incurred by Respondent

The petitioner requests that the reasonable market rate does not govern and that fees be confined to amounts expended under the fee agreement rate. In support of the above the petitioner asserts that the actual award of $104,487.40 to be too much in excess of Respondent Wilson's actual payments to counsel of $15,758.86, that the civil rights law of attorneys fees is inappropriate, and that the award failed to reduce the amounts paid by the other five unsuccessful plaintiffs.

The agreement between the plaintiffs and attorney Gilbert was unique. The agreement provided that initially, Gilbert would be paid only $75-85 per hour. If the plaintiff was then successful in the litigation, Gilbert would then petition the court for fees at $250 per hour, and then reimburse plaintiff for fees paid. See R. 485, p.4. This unusual arrangement was to allow the plaintiffs to pursue their claim against the defendants despite their limited resource of funds while procuring a means for counsel to receive adequate and reasonable compensation for his services rendered. The Sixth Circuit upheld the fees award of $104,487.40 and the review of fee awards from the past so as to ascertain that a reasonable prevailing rate would be $125 per hour for out of court time and $175 per hour in court time. The above mentioned rate exactly corresponds to Gilbert's reasonable and customary fees.

Under 42 U.S.C. sec. 1988, a prevailing plaintiff is entitled to reasonable attorneys fees. Reasonable fees are what the District Court determines, in its discretion, reasonable market rates to be. The Supreme Court has explicitly held that

Civil Rights law should serve as a model for District Courts to use when fashioning attorneys fee awards in areas beyond civil rights-- for example, labor. *See Hensley* at 433, footnote 7 (1983), as construed by the Sixth Circuit Court of Appeals in the *United States, Tittle and Composition Roofers, Damp and Waterproofing Workers Assn. Local 307 v. G&M Roofing and Sheet Metal Co.*, 881 F.2d 291 (6th Cir. 1989) (Hensley governs attorneys fees under sec. 301). Hence, the use of civil rights attorneys fee law as a guide was well within the discretion of the lower courts. Furthermore, the Petitioner's claim that the courts below should have reduced the amount of fees by any amounts paid by the other five unsuccessful plaintiffs is a weak argument. The lower court did in fact implement such a reduction. Among the vast areas of reduction enumerated in this brief's statement of facts, the fees awarded do reflect a 25% reduction consisting of work done for the other plaintiffs not benefitting Wilson. R. 485 p. 12-13. However, the District Court also reasoned that to limit the award to dollars actually spent would result in a windfall to Local 92. Furthermore the Court stated that the fact that a number of plaintiffs shared in the duty of paying the attorney should not reduce the Union's liability to pay attorneys fees reasonably incurred. R.485 p.5. It was for the District Court to determine, in the sound exercise of its discretion, whether or not to reduce fees to the amount paid to Gilbert by Wilson alone. *See e.g. Zuniga v. United Can Co.*, 812 F.2d 443, 454 (9th Cir.1982).

A determination of attorneys fees is within the sound discretion of the District Court and will not be disturbed absent an abuse of discretion. *See id* at 454. As shown in the discussion above, neither the District Court in issuing nor the Court of Appeals in upholding the award abused their discretionary powers necessitating any disturbance. The respondent respectfully urges this court to uphold the decision

of the court below which properly calculated and awarded fees and costs rightfully due to the respondent.

F. CONCLUSION

This Court does not have jurisdiction to hear this matter because of the untimely filing of this petition and the Petitioner's refusal to follow the proper format in submitting the petition. Even if jurisdiction were granted, it would be improper for this Court to revisit the issue of attorney fees because the petitioner failed to make a timely objection to the previous ruling, and certiorari has been denied in this case. The District Court made a careful inspection of the costs and fees awarded to Respondent and his counsel, and made dramatic reductions upon its inspection. The Sixth Circuit correctly required the Petitioner in this hybrid 301 case to pay the Respondent's attorney fees incurred in pursuing his claims adverse to the Union. The Sixth Circuit was proper in affirming the award of attorney fees and costs because they were not excessive with respect to the amount actually incurred by the Respondent.

For the foregoing reasons, Respondent, James Wilson, respectfully prays that this court deny the petitioner's application for a writ of certiorari.

Respectfully Submitted,

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